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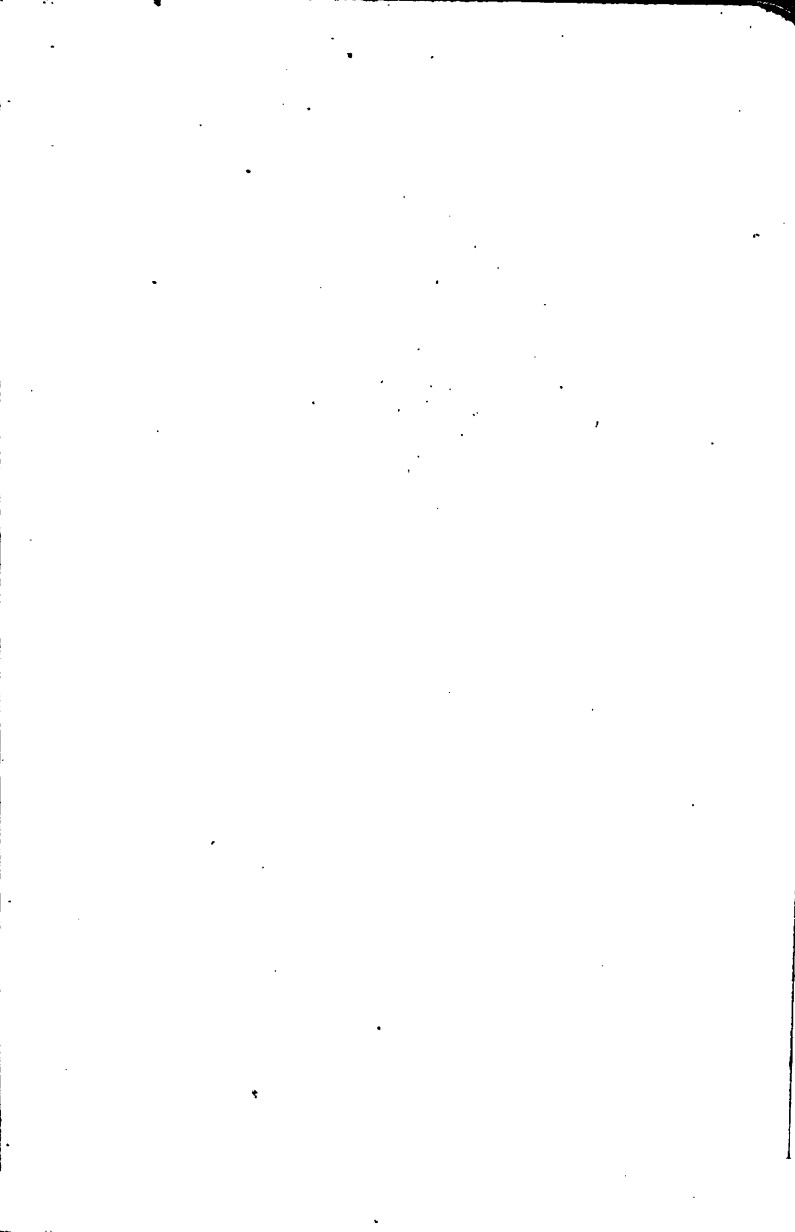


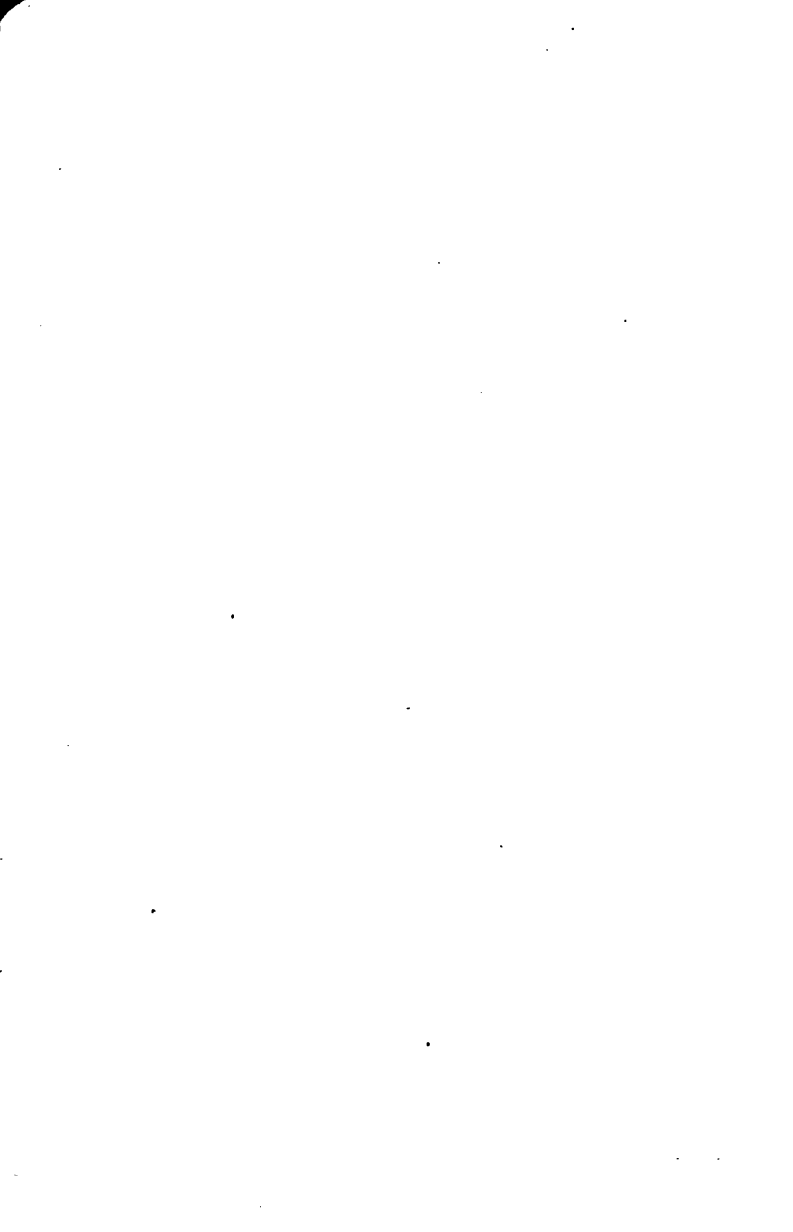
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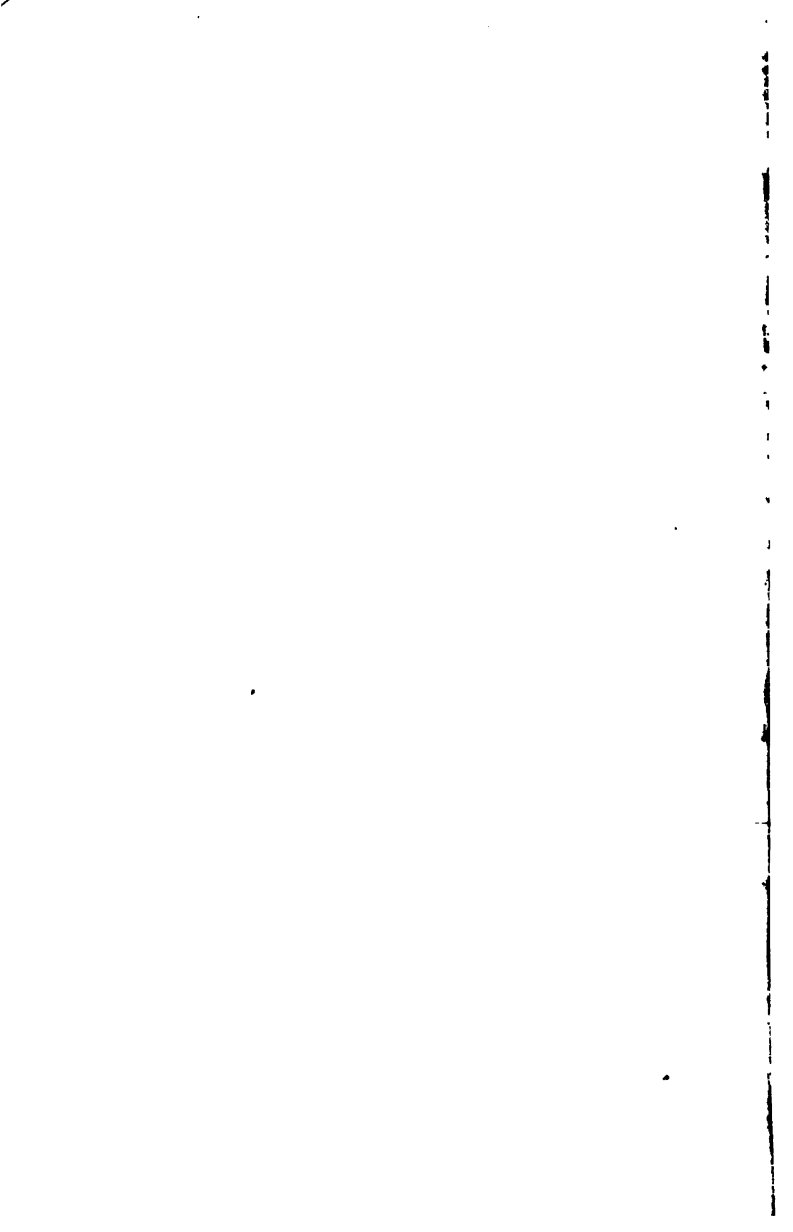






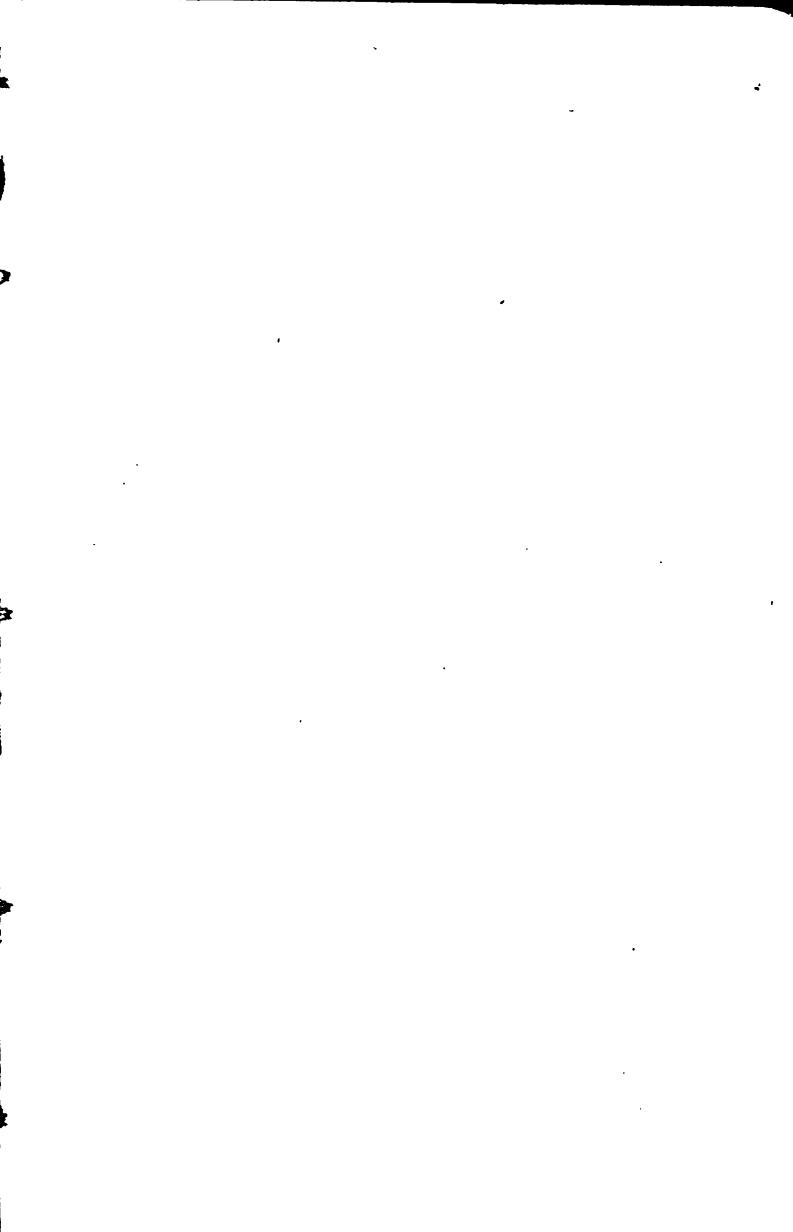




















# OHIO BAR EXAMINATIONS

WITH ANSWERS c†

BEING ALL QUESTIONS ASKED IN THE SIX OHIO  
BAR EXAMINATIONS FROM JUNE, 1919, TO DECEM-  
BER, 1921, INCLUSIVE, WITH AN ANSWER FOR EACH  
QUESTION.

BY <sup>aug (a)</sup>  
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**To E. M. P.**  
**My Pupil — My Wife**



## **P R E F A C E**

The following pages contain the questions asked in the Ohio Bar Examinations from June, 1919, to December, 1921, inclusive, together with an answer for each question. The subjects are placed in the order in which they are mentioned in the Supreme Court rules.

The answers have been prepared without any consultation with the authors of the questions, and with all the care that could be given by one actively engaged in law instruction and in the practice of law. The authorities have been cited wherever possible, and the interested student is strongly urged to consult them at first hand and thus master the principles therein contained.

The work is offered as an invaluable aid in the preparation of a student for examination, and also as a means of giving the applicant a general idea of what the bar examination really is.

**HOWARD D. BURNETT.**

**Cleveland, O., April 15, 1922.**



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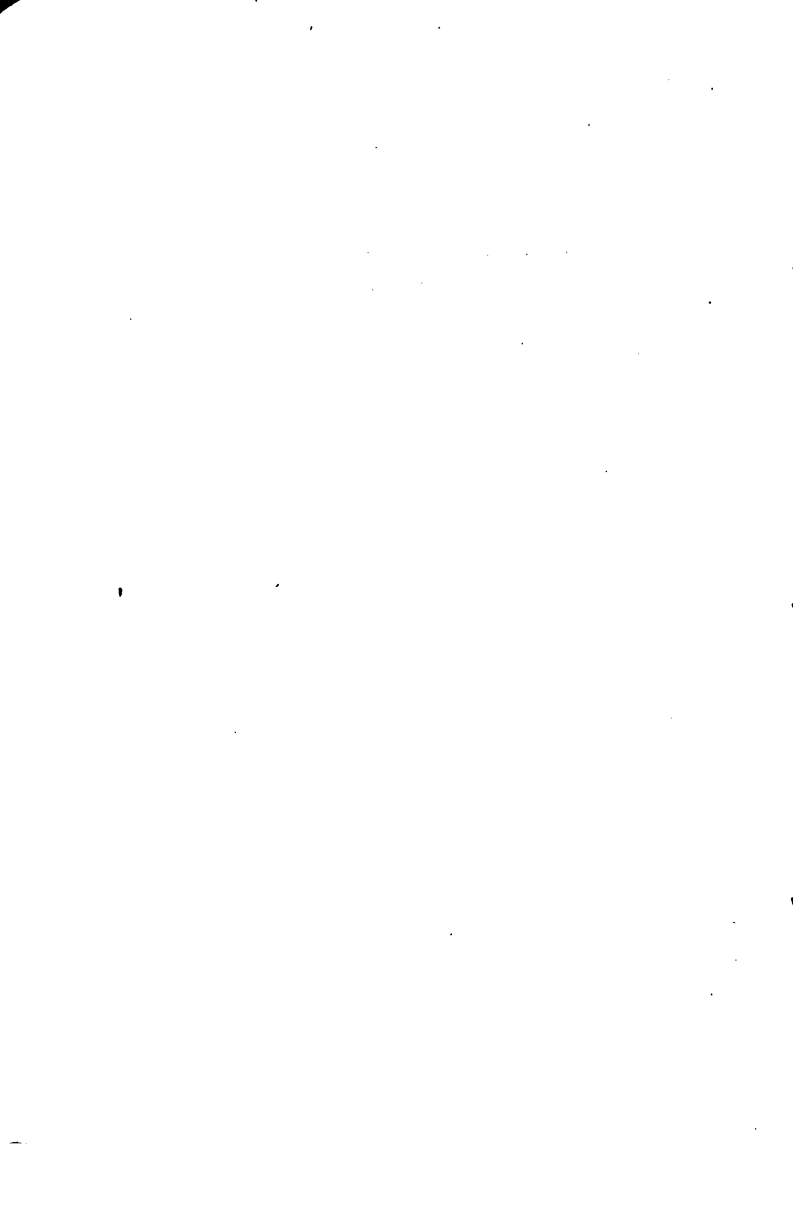
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**OHIO**  
**BAR EXAMINATIONS**  
**WITH ANSWERS**



# OHIO STATE BAR EXAMINATION

JUNE, 1919

## REAL PROPERTY

### Question 1.

- (a) Define Real Property.
- (b) What is the difference between an estate in reversion and a remainder?
- (c) What is the difference between a joint tenancy and an estate in common?

### Answer 1.

(a) With reference to the subject matter of property' real property includes land and things attached to land so as to become a part of it; with reference to rights of property or of ownership, real property means the estate, title, interest or rights in land which continue for life or are inheritable, either of full ownership, or of some partial enjoyment of the land or its profits. Burdick on Real Property, p. 10.

There are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these two qualities is not, according to the Normans, an heritage or fief; or according to us, is not a REAL ESTATE; the consequence of which in both laws is, that it must be a personal estate, or chattel. Blackstone's Comm., Vol II, p. 386.

(b) An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. Blackstone's Comm., Vol. II, p. 175.

An estate in remainder may be defined to be, an estate limited to take effect and be enjoyed after another estate is determined. Blackstone's Comm., Vol. II, p. 164.

(c) Joint tenancy exists when a single estate in land is owned by two or more persons claiming under one instrument; its most important characteristic being that, unless the statute otherwise provides, the interest of each joint tenant, upon his death, inures to the benefit of the surviving

tenant or tenants, to the exclusion of his own heirs, devisees, or personal representatives.

Tenancy in common exists when two or more persons hold separate estates in undivided shares of land, claiming either under different titles, or under a single instrument not showing an intent to create a joint tenancy. Tiffany on Real Property, p. 368.

Question 2.

In 1893, A, owner in fee simple, conveys land to B in fee simple. At the same time B executed an agreement in writing on behalf of himself, his heirs and assigns, to reconvey the land to A, his heirs and assigns, at any time after the year 1918, on payment of the consideration received by A. In 1908 B conveyed to C, who had notice of B's agreement. In 1919 A asks you what steps he can take to enforce the agreement. How would you advise him?

Answer 2.

B has a right to compel reconveyance to him, by a decree of specific performance against C. C., having knowledge of the contract, is bound by its terms and the transaction being a doubtful one, will be considered in equity as a mortgage.

The conveyance and agreement to recovery, being part of the same transaction, all parts of the transaction are supported by the original consideration.

"The fact that an absolute conveyance is accompanied by an agreement, or is subject to a condition, that the grantor may repurchase within a given time, at the same or a different price, is not conclusive that the transaction is a mortgage. Such a transaction is perfectly valid if it is what it appears to be, and the right to repurchase is lost if not exercised within the stipulated time. A difficult question however frequently arises, as to whether a transaction in form a conditional sale is not in fact a mortgage, as being intended to secure the payment of money, and a court of equity will closely scrutinize the transaction to see if this is the case, and will, if it appears to be such, give the grantor a right to redeem, with any other rights which belong to a mortgagor. In case of doubt, the courts will incline to consider the transaction a mortgage, thus applying a different rule from that applied to an absolute conveyance not accompanied by an agreement for repurchase." Tiffany on Real Property, p. 1181, Sec. 512.

**Question 3.**

A, owner in fee simple of Blackacre, mortgaged it to B. Later A erected a building thereon, and leased it to C for 20 years, for use as a factory. C put in an engine and boiler, which were securely fastened to the building by bolts and were intended to supply power to various machines set up by C in the building. During the term of the lease A became in default under the mortgage and B proposes to sell at a sale in foreclosure of the mortgage, the land, building, engine and boiler.

- (a) Has he a right to sell the building?
- (b) Has he a right to sell the engine and boiler?

**Answer 3.**

- (a) Yes. It is part of the freehold.
- (b) Yes. For the same reason.

"The question as to the steam engine and boilers is not directly involved in this case, but the application of the principle adopted in this case, plainly shows these articles to have been fixtures, and therefore part of the mortgaged premises. They were bolted and permanently fixed upon timbers, and stone and brick foundations laid in the earth, which were erected for them. The building itself was permanent and designed and used for a manufactory and these articles of ponderous character adapted to the production of the motive power of the establishment were firmly affixed to the structure of that portion of the freehold appropriated to the purposes of the business and clearly intended to be permanent." *Teaff vs. Hewitt*, 1 O. S., at 542. See also *Stone vs. Morris*, 4 Dec. Rep. 101; *Manufacturing Co. vs. Garven*, 45 O. S., 289.

**Question 4.**

A testator died leaving three sons A, B and C, and an unmarried daughter M. A part of his realty, Blackacre, he devised to M for her life, with remainder to her issue, surviving her, but if she leaves no issue than to B. Some time after the testator died, B died and then M died without issue. To whom does Blackacre descend?

**Answer 4.**

To the heirs of the testator.

These are "remainders on a contingency with a double aspect." The issue of M could not take, there being none;

and B's Contingent interest failed because of his death before the contingency upon which he was to take occurred—to wit, the death of M without issue. See *Tiffany on Real Property*, p. 300, Sec. 125.

Question 5.

A sells to B an apartment house in Columbus, Ohio, the rents of which aggregate \$1,000 per month, and are payable in advance on the first day of the month. The contract of sale does not refer to the rentals and the sale is closed in the 10th of the month. How do the rents for that month figure in the settlement?

Answer No. 5.

There is no apportionment, but the vendor will retain the rents for the current month and the vendee will be entitled to those accruing afterward.

“Upon the sale and conveyance of a reversion in land, in the absence of a stipulation to the contrary, the vendor remains the owner of all rents that have accrued before conveyance and the purchaser becomes the owner of all rents that accrue thereafter. Rent is not apportioned as to time.

The same rule applies where a tenement house, rented out by oral leases to a number of tenants, is sold and conveyed between rent days.” *Wald vs. Bien*, 14 O. N. P., N. S., 145.

At common law, rent is not regarded as accruing from day to day, like interest, but it becomes due only upon the day named for payment, and consequently, if a tenant in fee, or a tenant for life with power of leasing, after making a lease for years, die between two rent days, his executors are entitled to no part of the rent as against his heir or devisee, or as against the remainderman, and, upon a sale of land, the vendor has, in the absence of a special stipulation, no right to any part of the rent subsequently payable. *Tiffany on Real Property*, p. 783, Sec. 361.

Question 6.

A, owner of Blackacre, leased it to B for ten years. B covenanted to pay a certain rent annually in advance and the lease contains a condition of forfeiture for non-payment of rent. B assigned the lease to C, and C, five years before the lease expires, let one-half of the premises to D for one year. A protested against the

## BAR EXAMINATIONS

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assignment to C and the letting to D. Within one year after such assignment and letting an installment of rent became due and was not paid. A asks you what his rights are. How would you advise him?

**Answer 6.**

A has a right to institute proceedings to cancel the lease against C under the forfeiture clause of the lease.

A has no rights under the lease against D, as there is no privity between them.

"An estate for years may always be assigned by the owner thereof, unless this power is expressly restrained by a covenant or stipulation and the absence of the word "assigns" in the lease is immaterial." *Tiffany on Real Property*, p. 106, Sec. 46.

In the absence of a stipulation to the contrary, the tenant has a right at any time, to make a sublease of the premises, or of a part thereof. A sublessee of the tenant is not in privity of contract or estate with the original landlord, since he merely holds possession for the tenant, as it were, and consequently no mutual rights or obligations arise between them, and neither can enforce any personal liability on the part of the other. *Tiffany on Real Property*, p. 113, Sec. 48.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### REAL PROPERTY

#### Question 7.

Define (a) an estate in land (b) a title to lands (c) an estate pur autre vie.

#### Answer 7.

(a) An ESTATE in lands, tenements and hereditaments signifies such INTEREST as the tenant has therein. Blackstone's Comm., Vol II, Chap. 7.

(b) A TITLE is the MEANS whereby the owner of lands hath the just possession of his property. Complete title requires possession, right of possession and right of property. Blackstone's Comm., Vol. II, Chap. 13.

(c) Where one holds an estate by the life of another, he is usually called tenant PER AUTRE VIE. Blackstone's Comm., Vol. II, Chap. 8.

#### Question 8.

Know all men by these presents: That I, Wm. Cooper of Columbus, Ohio, in consideration of \$500 to me paid by James Cooper, my son, in receipt of which I do hereby acknowledge, I do hereby give, grant, bargain, sell and convey to my said son, James Cooper, his heirs and assigns forever, the following described real estate, to wit: (DESCRIPTION) to have and to hold the aforesaid described premises to the said James Cooper his heirs and assigns forever, etc.

The remainder of the deed includes usual covenants of title and warranty, is signed and acknowledged. All regular.

If the above grant is within the rule in Shelly's case which of the parties named in the deed is the ancestor, the root of inheritance?

#### Answer 8.

The grant is within the rule in Shelley's case, being a conveyance to James Cooper and immediately to his heirs.

James Cooper is the person referred to in the rule, as the ancestor, the root of inheritance.



## **BAR EXAMINATIONS**

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### **Question 9.**

- (a) May real estate in Ohio escheat to the state?
- (b) Name two estates for life created by law.
- (c) A comes to your office and employs you to examine the records for liens upon a tract of real estate he is about to purchase. Name the records you would examine.

### **Answer 9.**

(a) Yes. On the failure of all the various classes of heirs mentioned in the statutes of descent and distribution, real estate will escheat and be vested in the state of Ohio. Gen. Code, 8576.

(b) 1. Dower.

2. Estate tail special after possibility of issue extinct.

3. The interest of a surviving spouse in ancestral realty, where the deceased spouse died intestate without children or their legal representatives. Gen. Code, 8573-2.

(c) Mortgage records.

Mechanics Lien records.

Pending suits and living judgments in state and Federal courts.

Probate records if probate proceedings are in the chain of title.

Municipal assessments for streets, sidewalks, sewerage or oiling.

### **Question 10.**

(a) In what respect (with reference only to their creation) do estates in reversion differ from estate in remainder?

(b) A sells and conveys his real estate to B, reserving a right to occupy and hold possession of said premises for a period of thirty days free of rent. B accepts the deed for said real estate containing said reservation and pays to A the full consideration recited in said deed. B holds the deed, but does not have it transferred or recorded. In fifteen days after the delivery of deed to B, both A and B become dissatisfied with the transaction and mutually

agree to rescind. B returns to A the unrecorded deed and A returns to B the consideration money.

In whom is the title vested?

Answer 10.

(a) An estate in remainder is created by the act of a grantor, while an estate in reversion is created by operation of law.

(b) B has the title.

Where a deed conveying real estate is executed and delivered, the destruction of the unrecorded instrument will not re-vest the title in the grantor; and the grantee will not be estopped to claim the land under such conveyance, unless such claim would operate as a fraud on his part. *Jeffers vs. Philo*, 35 O. S., 173.

This rule applies even where the deed was destroyed by the mutual agreement of the parties with the belief that it would operate as a conveyance of the property. *Spangler vs. Dukes*, 35 O. S., 119; 111 Longs. Notes, 764.

The redelivery of a deed which has once taken effect upon delivery does not re-vest the title, even if the parties expect that such redelivery will operate as a reconveyance. *Starr vs. Starr*, 1, O., 321; 1 Longs. Notes, 85; *Baldwin vs. Bank*, 1 O. S., 141; 1 Longs. Notes, 958.

Question 11.

(a) Wm. Thompson borrowed from Felix Johnson \$500 and to secure this loan, due in one year, executed and delivered to Felix Johnson a warranty deed for his farm. When said loan became due Wm. Thompson tendered to said Felix Johnson said \$500 and interest and requested that his farm be reconveyed to him. Johnson refused to accept the \$500 and interest and refused to reconvey said farm to Thompson. What remedy has Thompson and what relief should he ask?

(b) John Smith leases to Bill Jones a house and lot for a period of ten years at an annual rental of \$100. Bill Jones immediately erects on said premises a valuable building; the lease gives Bill Jones the right to purchase said premises so leased at any time during the lifetime of John Smith, the price to be determined by three disinterested persons to be selected by terms stipulated in the lease. At the end of the ten years, both parties are living. John Smith notifies Bill Jones that he will increase his rent to \$300 for ground and building. After the expiration of the first month Jones

## BAR EXAMINATIONS

seeks to avail himself of the option to buy given him in the lease Smith claims has expired. What are the rights of the parties?

Answer 11.

(a) Thompson should file a bill in equity praying for a decree declaring the deed to be a mortgage, and ordering that the same should be cancelled upon the records upon the payment of the mortgage debt.

A deed, even if absolute in form, is a mortgage if it is given as security for a debt. *Slutz vs. Desenberg*, 28 O. S., 371; 111 Longsdorf's Notes, 412.

A deed, given as security, is only a mortgage whatever its form, and this may be shown by parol. *Exporting Co. vs. Bank, W.*, 249; 1 Longs. Notes, 21.

(b) Jones has a lease on the premises for one year from the expiration of the written lease, at the annual rental of \$300. Jones cannot avail himself of the option to buy. A contract such as this has been construed by the Circuit Court for the First district of Ohio to the effect that the only death contemplated by the parties was that of the lessor during the life of the lease.

"If the right to purchase by the lessee was to continue indefinitely after the expiration of the lease, and as long as the lessor should live, certainly some statement to this effect would have been inserted in the lease, for the natural presumption would be that the option to purchase would be co-extensive with the lease.

If the real intention of the parties was that the option should extend after the period of the lease, and within the life time of the lessor, apt words would have been used indicating such an intention and it would not be left to be gathered from words which show that the lease was for ten years and which naturally show that the option was to be exercised within that time, or the life-time of the lease. No provision is made for the rental after ten years and the lease having terminated, the lessor is entitled to the possession of the premises." *Frechtling vs. Jacobs*, 9 O. C. C., N. S., 554; 19 O. C. D. 638.

Question 12.

Has an administrator the right to collect rent of real estate belonging to his decedent, said rent accruing after the death of his decedent and before the date of his final account?

## OHIO SUPREME COURT

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Answer No. 12.

He has not the right.

"The rents of the land of an insolvent estate, accruing between the death of an intestate and a sale of the land for the payment of debts by the administrator, belong to the HEIR and not to the administrator." *Overturf vs. Dugan*, 29 O. S., 230; 111 Longs. Notes, 462.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### REAL PROPERTY

#### Question 12.

Define (a) Fee Simple estate. (b) Estate tail and (c) Executory devise. Give example of each.

#### Answer 12.

(a) Tenant in fee simple is he that hath lands, tenements or hereditaments, to hold to himself and his heirs forever; generally absolutely and simply; without mentioning what heirs, but referring that to his own pleasure, or to the disposition of the law. This is property in its highest degree. Blackstone Vol. II, p. 104.

Example—Blackacre to A and his heirs, forever.

(b) That sort of an estate created by the statute of Westminster the second, commonly called the statute de donis conditionalibus which changed an estate given to a man and the heirs of his body, from a fee upon condition, to a life estate with remainder over to issue, until failure thereof; the ultimate fee being vested in the donor.

Example—Blackacre to A and the heirs of his body.

(c) Executory devises are future limitations of real property by will, which would not have been valid as limitations under the rules of the common law.

Example—Devise of Blackacre to my son John, when he reaches the age of 21 years; and where the testator has died before the son John had reached that age.

#### Question 13.

(a) Name the most common estate cast by statute in Ohio and upon whom.

(b) A died intestate leaving wife and children. He owned a contract to purchase some realty, the performance of which fell some months after his death. Title to the real estate was taken by the administrator, carrying out the contract with money belonging to A's estate, in the name of the children.

Upon the sale of the property, did the wife have any interest in the proceeds thereof, and if so, what?

#### Answer 13.

(a) Dower. Upon the surviving spouse.

(b) The wife has a right to a life interest in one-third of the proceeds thereof.

A widow shall be endowed of an estate for life in one third of all the title or interest that the deceased consort had at decease, in any real property held by article, bond or other evidence of claim. Gen. Code, 8606.

Question 14.

(a) How is a title to real estate acquired by prescription?

(b) The owner of a business room in a city for 23 years used a part of the public square of the city in going to and coming from the rear of his building and the street in front of the same. The city authorities closed this passageway against such use. Upon suit against the city to enforce reopening of the way, who should prevail and why?

Answer No. 14.

(a) No prescription can give title to lands, and other corporeal substances, of which more certain evidence may be had.

Nothing but incorporeal hereditaments can be claimed by prescription. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed.

Lands lie in livery, and incorporeal hereditaments in grant. 11 Blackstone, 264.

An action to recover the title or possession of real property shall be brought within twenty-one years after the cause thereof accrued. Gen. Code, 11219.

(b) The city should prevail.

The right of an adjacent land owner to enclose by a fence, however constructed, a portion of the public highway cannot be acquired by adverse possession however long continued. Heddleson vs. Hendricks, 52 O. S., 460; Followed in 23, O. N. P., N. S., 118.

Question 15.

The owner of a farm in Ohio, developed a small oil well thereon, in January, 1919, and the pumping thereof for several months showed capacity of two barrels a day. The township assessor in April, 1919, insisted that the owner list for taxation as personal property the estimated product of the well for the ensuing tax year, that is 730 barrels at the market value. The owner refused. Was he right or wrong and why?

## BAR EXAMINATIONS

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### Answer 15.

The owner was right.

Oil in the ground is a part of the realty. *Kelley vs. Ohio Oil Co.*, 57 O. S., 317; *Northwestern Ohio Nat. Gas Co. vs. Ullery*, 68 O. S., 259.

### Question 16.

A, having a judgment against B, ordered execution issued from the common pleas court to the sheriff of Franklin County, to be levied on a business block in Columbus, on which B had a 99-year lease renewable forever. Can a good title be acquired by a purchaser at sheriff's sale?

Would the original lessor, or his heirs, in any wise be affected by the sale of this lease hold?

### Answer 16.

Yes. As to the lease hold estate. 68 O. S., 259.

A lease for years (99 years) can be levied on and sold as a chattel. *Bisbee vs. Hall*, 3 O., 449.

Therefore a good title to the leasehold estate can be acquired by a purchaser at the sheriff's sale.

The original lessor, or his heirs, could in no way be affected by the sale of the leasehold, as they have no rights in the property until the termination of the lease.

### Question 17.

(a) Define "waste" as applied to realty.

(b) A tenant rented a farm for farming purposes, and finding large and excellent deposits of sand and gravel thereon, opened a pit and sold a quantity of each for his own account.

Was the tenant within his rights? If not, why not?

What were the landlord's rights, if any, against the tenant?

### Answer 17.

(a) Waste is any unlawful act or omission of duty which results in permanent injury to the inheritance. Voluntary waste is that which results from some positive act of destruction or devastation. Permissive waste is that which results from the neglect or omission to do that what will prevent injury. *Hopkins on Real Property*, p. 62.

(b) The tenant was not within his rights, as the deposits of sand and gravel constitute part of the land.

The landlord has a right of action against the tenant for the damage already done, and the right to an injunction to prevent further injury.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1920

### REAL PROPERTY

Question 18.

- (a) Define free-hold estate.
- (b) Define estate in remainder.
- (c) Define estate in reversion.

Answer 18.

An estate of freehold is defined by Blackstone as being an interest in land, which was not beneath the dignity of a freeman to hold, consisting of an interest for life or a greater interest. A freehold estate is one in which possession can, by the course of the common law, only be given by the ceremony called livery of seisin.

(b) An estate in remainder is an estate limited to take effect and be enjoyed after another estate is determined, both estates passing out of the grantor at the same time and by the same instrument. Blackstone's Comm., Vol. II, Chap. 2, p. 164.

(c) An estate in reversion is that residue of an estate left in a grantor, to come into possession at the termination of some particular estate which has been granted out by the grantor. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant it over. Blackstone's Comm., Vol. II, Chap. 2., p. 175.

Question 19.

John Smith enters into a written contract for the sale of his farm to Thomas Brown, stipulating that he will give Brown a good title, clear, free and unencumbered on December first. On that day Smith's wife refuses to sign the deed relinquishing her inchoate right of dower in the premises.

What action, if any, has Brown against Smith?

Answer 19.

Brown has an action against Smith for damages only. "Under these circumstances a purchaser cannot have a decree for specific performance with compensation for defects, because the court would be compelled to make an abatement as to the purchase price of the amount of the wife's inchoate



## BAR EXAMINATIONS

dower interest and making such abatement would result in an attempt to arrive at the amount to be deducted by a process which is admittedly speculative or with an alternative of suspending a considerable portion of the purchase money to the seller during the joint lives of himself and his wife." *Caple vs. Crane*, 31 O. C. A., 225; O. L. R., Oct. 18, 1920. See to the same effect. *Barnes vs. Christy et al.*, 102 O. S., O. L. R., Sep. 5, 1921.

### Question 20.

A delivered a deed absolute on its face to B for his home and B agreed to hold said property until such time as A should repay to him a loan of \$10,000.

On the date the loan becomes due, A tenders the amount of the loan to B, but B refuses to reconvey the land to A. Can he be compelled to? If so, why? If not, why not?

### Answer 20.

B can be compelled by a decree in specific performance to reconvey the land to A and if he does not do so the court will place an entry on its journal which will effect the re-conveyance. The transaction being the giving of real property as security for a loan will be considered in equity to be a mortgage.

### Question 21.

Before marriage to Thomas Brown; Mary Jones agreed that she would not claim dower in Brown's property. Subsequent to their marriage, Brown purchases a farm and dies and his wife survives him.

Can she claim dower in this land? Give reasons.

### Answer 21.

Yes.

General Code 8608 provides that the conveyance of an estate or interest in real property to a person in lieu of dower to take effect on the death of the grantor, if accepted by the grantee, will bar the grantee's right of dower in the real property of the grantor.

The ante-nuptial covenant of a woman that in case she survives her husband, she will not claim dower in his estate, cannot in an action by her for dower, operate to bar such action, either by way of release or estoppel, for such ante-nuptial contract does not constitute either a legal or equitable bar. *Grogan vs. Garrison*, 27 O. S. 50.

Question 22.

- (a) What are fixtures?
- (b) When, if ever, may they be removed by the tenant?
- (c) What are emblements?
- (d) When, if ever, may they be removed by the tenant?

Answer 22.

(a) Fixtures are chattels, annexed in a manner to the ground, concerning which the right to remove might be in controversy between the temporary occupant or his representatives and the owner or successor to the freehold. Schouler, Vol. I, Par. 112.

(b) Personal property which has been attached to the realty may be removed by the tenant if the court reaches the conclusion that the property is personal property and has not become in law a part of the realty. To determine this question four elements are considered:

1. Contract of the parties.
2. Nature of the subject matter.
3. The method of annexation.
4. The effect of removal. Chase Mfg. Co. vs. Gar-

ven, 45 O. S. 289.

(c) Emblements are a special kind of personal property, in corn growing on the ground, or in general other *fructus industrialibus*. These are owned by any other possessor of the land, who has grown or planted them, whether he be the owner of the inheritance or of a lesser estate, and this species of property is distinct from the real estate in the land. They were devisable by testaments before the statute of wills, and at the death of the owner vests in the executor and not in the heirs.

(d) Emblements may be removed by the tenant during the period of his tenancy; and in some cases after the tenancy has expired, where the tenant is held for an indefinite and uncertain period, and the tenancy has been terminated not by the act of the tenant. In the case of a tenant for years, whose term depends upon a certainty, he is not entitled to emblements, as it is his folly to sow when he knows that his term will expire before he can reap.

Question 23.

(a) A railroad company brings suit to condemn certain real estate for the use of its tracks. What elements enter into the fixing of the value by the jury in such a case?

(b) In Ohio, what rights has an administrator in the real estate of a deceased?

## BAR EXAMINATIONS

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(c) Are the rents and profits from real estate, after the death of the intestate, payable to the administrator or to the heirs?

Answer 23.

(a) No right of way shall be appropriated to the use of any corporation, until full compensation therefore be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law. Ohio Const., Art. XIII, Sec. 5.

(b) In Ohio an administrator has no right in the real real estate of the deceased, unless it is necessary to sell the real estate to pay the debts of the deceased, or to convey the real property to complete contracts made by the deceased in his lifetime.

(c) Immediately upon the death of the intestate, the title to his real property vests in his heirs, and rents and profits therefrom are of course payable to the heirs.

# OHIO STATE BAR EXAMINATION

JUNE, 1921

## REAL PROPERTY

Question 24.

(a) Upon the death of A it was discovered that he was the lessee in two leases; one for the term of six years and the other for a term of ninety-nine years renewable forever. To whom did these leases go, his administrator or his heir?

(b) What became of such leases at Common Law?

Answer No. 24.

(a) The six year lease went to the personal representative of the decedent, and the perpetual lease to the heir.

Permanent lease-hold estates, renewable forever, shall be subject to the same law of descent as estates in fee are subject to by the provisions of this chapter. Gen. Code, 8597.

(b) By the common law, leasehold estates were regarded as chattels—chattels real, to be sure, but nevertheless subject to the rules relating to chattel property. Taylor vs. DeBus, 31 O. S., at 472.

Therefore they went to the personal representative.

Question 25.

What is meant by:

- (a) A servient estate?
- (b) An estate pur autre vie?
- (c) Eminent Domain?
- (d) Allodial lands?
- (e) Defeasance Clause?

Answer 25.

(a) An easement is a privilege or right, without taking any profit, which the owner of one parcel of land has, by reason of such ownership, to use the land of another for a certain defined purpose not inconsistent with the general property in the latter. The property which is subject to the use is called the SERVIENT ESTATE. Burdick on Real Property, p. 403.

(b) A conventional life estate, which is measured, not by the tenant's life, but by the life of some other person.

## BAR EXAMINATIONS

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It is the lowest estate of freehold. *Burdick on Real Property*, p. 85.

(c) The right of the nation, or the state, or of those to whom the power has been lawfully delegated, to **CONDEMN PRIVATE PROPERTY TO PUBLIC USE**, and to appropriate the ownership and possession of such property for such use, upon paying to the owner a due compensation, to be ascertained according to law. *Black Const. Law* Page 468.

(d) Those which were wholly independent, and held of no superior at all. *Blackstone's Comm.*, Vol. II, p. 47.

(e) A defeasance is a collateral deed, made in connection with some other conveyance, usually a feoffment, providing that upon the performance of some condition therein expressed, the original conveyance shall be void or defeated. *Blackstone's Comm.*, Vol II, p. 327.

A defeasance cause is a condition in a deed, providing that upon the performance of the condition, usually the repayment of money loaned, the deed shall become void.  
Question 26.

(a) What rights has the owner of lands in a navigable stream of water that flows through the same? Explain fully.

(b) To what extent are entailments allowed in Ohio?  
Answer 26.

(a) A riparian owner has the right to use the water in a reasonable way, but he must not divert it from its course or detain it more than a reasonable time. He has no right to corrupt the water which flows over his land, unless such right is acquired as an easment. Furthermore, he must not dam up the water so as to cause it to flow back upon the lands of the owners above. The rights of owners whose lands border on navigable streams are the same, as far as the common law is concerned, as the rights of other riparian owners; but they must not obstruct navigation. *Burdick on Real Property*, p. 434.

(b) No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons, but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail. *Gen. Code*, 8622.

Question 27.

(a) In the granting and habendum clauses of a war-

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ranty deed A conveyed certain lands to his "daughter B and her children." At the time of the execution and delivery of the deed, B had one child C, and two years later she had another child D.

Upon the death of B leaving C and D surviving her, what interest, if any, did these children have in said lands by virtue of said deed?

(b) Give reasons for answer.

**Answer 27.**

(a) C had a life estate in an undivided one-half of the property.

(b) The indispensable word "heirs" is not used, therefore not more than a life interest is granted. Blackstone's Comm., Vol. II, p. 107.

Under the laws of Ohio, when lands are conveyed to a husband and wife jointly, they take by moieties as tenants in common. *Bank vs. Wallace*, 45 O. S., 152; IV Longs., 266.

It is indispensable to the validity of a grant that the grantee be capable of receiving it; that is, that he be a person in being at the time the grant is made.

A grant to him or her who is to be the first child of T. S. or to his right heirs, he being living, is void. *Shep. Touch*, 235. The same principal will apply to the unincorporated inhabitants of the town of Wooster, as to their capacity to be grantees. The instrument is dated in 1811. The town of Wooster was incorporated in 1824. A grant to the inhabitants of Wooster, admitting they were capable in law to take, would only vest the estate in joint tenancy in those who were **ACTUALLY SUCH AT THE DATE OF THE GRANT**. The tenancy could not be made to extend to others, who, subsequently, became inhabitants. Upon the death of the inhabitants in esse, at the date of the deed the right would either be in abeyance, or revest in the grantors. *Sloane vs. McConahy*, 4 O., 157; I Longs., Notes, 214.

**Question 28.**

(a) Is the course of descent of real property in Ohio controlled by the legal or equitable title therein?

(b) In general terms state what provision is made by statute for occupying claimants?

**Answer 28.**

(a) A devise of real estate in trust to trustees, to collect the rents and pay a definite sum annually to the widow of the testator during her life, and to divide the residue equally among his children "or their heirs;" and, at the

## BAR EXAMINATIONS

death of his widow, to convey an equal part of his lands to each of his children "or their heirs," vests an equitable estate in each of his children at the death of the testator, in the absence of a clear intention to postpone the vesting to some later time. Equitable estates vest and descend as legal estates. *Bolton vs. Bank*, 50 O. S., 290.

Under the statutes of descent and distribution the course of descent of Real estate is to be controlled by the legal title. *Patterson vs. Lampson*, 45 O. S., 77.

(b) A person who, without fraud or collusion on his part, obtained title to and is in the quiet possession of lands, or tenements, claiming to own them, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant or his heirs, is paid the value of lasting improvements made by him on the land, or by the person under whom he holds, before the commencement of suit on the adverse claim whereby such eviction may be effected, unless the occupying claimant refuses to pay to the party establishing a better title the value of the lands without the improvements made as aforesaid, on demand by him or his heirs, when:

1. Such occupying claimant holds a plain and connected title in law or equity, derived from the records of a public office, or

2. Holds it by deed, devise, descent, contract, bond or agreement, from and under a person claiming the title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or,

3. Under sale on execution against a person claiming title as aforesaid, derived from the records of a public office, or by deed duly authenticated and recorded; or

4. Under a sale for taxes authorized by the laws of this state; or

5. Under a sale and conveyance made by executors administrators, or guardians, or by any other person or persons in pursuance of an order or decree of court, where lands are directed to be sold. *Gen. Code*, 11908.

Question 29.

(a) What elements are necessary to constitute a title by prescription?

(b) When and how can an administrator sell real estate belonging to his decedent?

Answer No. 29.

(a) At common law, a holding from a time whereof

## OHIO SUPREME COURT

the memory of man runneth not to the contrary. Blackstone's Comm., Vol. II, Chap. 17.

Blackstone says that nothing but incorporeal heriditaments can be claimed by prescription, for the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. No prescription can give title to lands, and other corporeal substances, of which more certain evidence may be had. (i. e. lands lie in livery.) Id.

An action to recover the title or possession of real property, shall be brought within twenty-one years after the cause thereof accrued, but if a person entitled to bring such action at the time the cause thereof accrues, is within the age of minority, of unsound mind or imprisoned, such person after the expiration of twenty-one years from the time the cause of action accrues, may bring such action within ten years after such disability is removed. Gen. Code, 11219.

To avail against the world, the possession of the holder must be continuous, open, notorious and adverse.

(b) Sale of real estate of a decedent may be made by an administrator, when it is necessary for the payment of debts, etc., of the decedent, to complete contract for sale made by the decedent in his life time, or under a power given by a testator.

Sales under a power are governed by the rules of equity. When a person who has entered into a written contract for the sales and conveyance of an interest inland dies before its completion, and his executor, administrator, or other legal representative, desires to complete it, he may file a petition therefor in the common pleas or probate court of the county in which the land, or any part thereof, is situated. Gen. Code, 11922.

As soon as the executor or administrator ascertains that the personal estate in his hands will not pay all the debts of the deceased, with the allowance to support the widow and children for twelve months, and the charges of administering the estate, he must apply to the probate court or court of common pleas for authority to sell the decedent's real estate. Gen. Code, 10774.

To obtain such authority, the executor or administrator shall commence a civil action in the probate or common pleas court of either the county in which the real estate, or any part thereof, is situated, or of the county in which his letters testamentary or of administration were issued. Gen. Code, 10775.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### REAL PROPERTY

#### Question 30.

With respect to their nature, incidents and limitations, state and describe the respective rights of an abutting property owner:

- (a) In a city street.
- (b) In a highway outside a municipal corporation.

#### Answer 30.

(a) It has been said that it is immaterial from a standpoint of the relative rights of the abutting property owners and the public, whether the abutting property owner owns the fee in the street subject to the public easement, or whether the fee is in the municipal corporation in trust for the public and subject to the rights of the abutting property owners; since in the one case the right of the abutting property owners are legal, and in the other they are equitable, but in either case they are substantially identical." Callen vs. Electric Light Co., 66 O. S., 166; IV Longs. Notes, 901.

(b) "The fee of the land to the center of the road way remains in the adjacent owner, subject to the easement acquired by the public in appropriating the right of way for a highway. The abutting owner has a right to all of the uses of the land not inconsistent with the rights of the public therein. He has a right to cultivate and raise crops on so much of his side of the highway as is not actually used for travel, and has a right to plant and raise and enjoy trees and a right to the herbage and may graze his cattle thereon, and may maintain trespass against others infringing such right." 23 O. N. P., N. S., 118; O. L. R., Jan. 3, 1921.

#### Question 31.

(a) Define an easement and state and describe the different kinds of easements.

(b) With respect to its nature and incidents, state wherein an easement differs from a license with respect to real property.

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### Answer 31.

(a) An easement is a right, in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit.

The easements of most importance are:

Rights in extension or diminution of natural rights in regard to air, water, and support;

Rights of way over another's land;

Rights to maintain aqueducts or drains on another's land;

Rights as to the use of party wall in part or wholly on another's land.

Rights to have light and air pass to one's windows without obstruction;

Pew rights in churches and burial rights in cemeteries.

(b) To be distinguished from easements are licenses, which merely justify acts on another's land which would otherwise be illegal. They may be revoked at any time, except, in some states, after the license has incurred expense under the license, and they are not assignable. Tiffany on Real Property, p. 677.

### Question 32.

John Smith, an aged man, being the owner of a certain farm, conveyed the same by deed to a married daughter, Anna Brown; the said deed in the granting and habendum clauses being to "Anna Brown and to the heirs of her body," said Anna Brown at the time having three sons, John, Henry and Richard. Thereafter, during the life of Anna Brown, John Brown, one of her said three sons, being of competent age, sold and conveyed, for valuable consideration, an undivided one-third interest in said premises to one William Jones. Shortly afterwards John Brown died, unmarried, intestate, and without issue; and thereafter Anna Brown died intestate leaving a husband, William Brown, and her two sons, Henry Brown and Richard Brown.

State the respective interests in said premises taken by William Jones, William Brown, Henry Brown and Richard Brown. Give reasons for your answer.

### Answer 32.

William Jones has acquired no interest in the property.

"Under Section 8622, General Code, the issue of a donee in tail during the life of such donee, has no estate or inter-

## BAR EXAMINATIONS

est in the lands entailed which he can alienate." *Duncan vs. Kline*, 81 O. S., 371.

William Brown has a dower interest in the real estate.

"The statute to restrict the entailment of real estate (General Code 8622) does not change the nature of the estate in the first donee in tail from an inheritable estate to an estate for life merely. The object of the statute is to restrict the entailment to the immediate issue of such donee, and, on the determination of his interest in the estate, and of such rights as the law annexed to it while held by him, to enlarge the estate tail in the hands of such issue into an absolute estate in fee simple. One of the incidents of an estate in fee tail, at common law is the right of surviving husband to an estate by courtesy, with which the statute above referred to does not interfere, and to which, in this state, the husband is entitled whether there is issue born during the coverture or not." *Neary Harkness vs. George C. Corning*, 24, O. S., 416.

Henry Brown and Richard Brown each take an undivided half interest in fee simple in the premises subject to the dower right of William Brown. "All estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." Ohio Gen. Code, 8622.

### Question 33.

A, being the owner of certain real property, executed a mortgage thereon to secure the payment of money borrowed by him, his wife joining in said mortgage and expressly releasing her right of dower in said property. Thereafter, the condition of said mortgage having been broken, the mortgagee instituted foreclosure proceedings against said property, to which proceedings a number of subsequent judgment creditors were made parties, who set up in said proceedings their respective judgment liens. The property being sold on order of the court in said proceedings, the proceeds of said sale, amounting to \$7,500 were brought into court for distribution. At the time of the order of distribution the court costs were \$90 and said mortgage debt, including interest thereon, was \$4,750.

As against the judgment creditors, on what sum of money was the contingent dower interest of A's wife legally computed.

### Answer 33.

The widow is dowable upon the entire proceeds of the sale, to wit: \$7,500.

"Where the wife has joined in a mortgage of the husband's lands to secure his debts, upon a judicial sale of the premises, she may have the value of her contingent right of dower in the entire proceeds ascertained and the husband's entire interest thereon shall be exhausted to pay the debt before resorting to the interest of the wife thereon.

The release, in such mortgage, of her contingent right of dower does not inure to the benefit of the husband's subsequent judgment creditors, and, as against them, the ascertained value of her contingent right of dower in the entire proceeds of the sale will be paid to her out of the balance left when the mortgage is paid, before any part thereof will be distributed to them on their judgment." *Mandel vs. McClave, et al.* 46 O. S. 407.

Question 34.

(a) State the purpose for which the consideration clause in a deed is to be deemed conclusive. Give examples.

(b) State the purposes for which the consideration recited in a deed is not conclusive as against parol evidence offered to explain or vary the same. Give examples.

Answer 34.

(a) "The consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of a deed, creating a right or extinguishing a title." *Shehy vs. Cunningham*, 81 O. S., at p. 291.

"Where a father, by a deed reciting a valuable consideration granted property to a son who had died intestate without issue and seized of the land, it was held that parol evidence was not competent to show that no consideration was in fact paid which testimony if admitted would have made the land descend as ancestral property." *Williams vs. Williams*, 3 W. L. M., 258.

"Where a father paid the purchase price, and had the seller deed land direct to his daughter, the conveyance to her being in fact a wedding gift from the father, and the deed reciting a consideration of \$6,000.00, it was held that the consideration clause of the deed could not be varied or explained to change the operation and effect of the deed." *Patterson vs. Lanson*, 45 O. S., 77.

(b) The consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, creating a right or extinguishing a title, but that for every other purpose it is open to

## BAR EXAMINATIONS

explanation by parol proof, and is prima facie evidence only of the amount, kind and receipt of the consideration, and is settled by the almost unbroken current of American decisions, although the contrary is true in England." *Shehy vs. Cunningham*, 81 O. S., at p. 291.

"Where on one side it was claimed that the conveyance of one tract of land was the consideration for an agreement to convey another in exchange; and on the other side, that the conveyance was an advancement from father to son, it was held that parol evidence was competent on the question of whether or not the conveyance was an advancement and that the recital of the consideration in the deed was not conclusive." *Harrison vs. Castner*, 11 O. S., 339.

"Where a son received land from his father the deed of conveyance reciting a consideration of \$4,700.00, in a suit by the other heirs for distribution of the father's estate, parol evidence was held competent to show that the \$4,700.00 was not in fact paid, and that the conveyance to the son was an advancement." *Shehy vs. Cunningham*, 81 O. S., 289.

### Question 35.

Real property of one P, a judgment debtor, was set off to him as a homestead under Section 11734, General Code. He thereafter sold and conveyed the same to one R for a valuable and adequate consideration.

Is said property in the hands of R subject to the lien of a judgment obtained against P prior to such sale and conveyance and to seizure and sale upon execution in satisfaction of such judgment?

### Answer 35.

The property in the hands of R is subject to the lien of the judgment.

"The right to have and hold a homestead is a personal privilege which cannot be conveyed to another, and is lost by neglect or refusal to claim it, or by abandonment of the homestead. When the rights of a homestead are removed, liens on such property may be enforced by due process of law." *McComb vs. Thompson*, 42 O. S., 139.

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### PERSONAL PROPERTY

#### Question 36.

What are the requisites of a sale of personal property?

#### Answer 36.

A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. Gen. Code, 8381-2.

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. When necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person and to his actual requirements at the time of delivery. Gen. Code, 8382.

A contract to sell or the sale of any goods or choses in action of the value of twenty-five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive them, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf. Gen. Code, 8384.

#### Question 37.

What is essential to constitute a gift—

Inter Vivos?

Causa Mortis?

#### Answer 37.

A gift is a voluntary, immediate and absolute transfer of property without consideration. A gift inter vivos is a gift made from one or more persons, without any prospect of immediate death, to one or more others. Bouvier's Law Dictionary.

A gift causa mortis is the gift of personal property, made by the donor under the apprehension of impending death, effectuated by delivery, and defeasible by resump-

## BAR EXAMINATIONS

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tion thereof by the donor, his recovery from that which occasioned his apprehension, or by the prior death of the donee. Gardner on Wills, p. 10.

Question 38.

Give the rule of caveat emptor.

Answer 38.

The purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case, or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale. Benjamin on Sales, Par. 611.

Question 39.

In how many different ways does title to personal property accrue? Name them.

Answer 39.

Twelve.

1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration. Blackstone's Comm., Vol. II, Chap. 26.

Question 40.

(a) What is the right of Stoppage in Transitu?

(b) In an action to recover damages for a false and fraudulent representation as to the value of personal property made by the seller in order to induce the purchaser to buy, what is the measure of damage?

Answer 40.

(a) The right of stoppage in transitu is treated as an extension of the common law lien of the seller for the price. It exists in the single case of the insolvency of the buyer, and presupposes that the possession is in a third person in the transit to the buyer. The basis of this right is that the insolvency of the buyer was not contemplated by the seller, and that it is just that he should, on account of that unforeseen event endangering the loss of the price, be permitted to reclaim the goods and keep them as security for payment at any time before a delivery terminating their transit. Benjamin on Sales, p. 181.

(b) The measure of damages for fraud in the sale of goods is generally the same as in actions for breach of warranty of quality, viz., the difference between their actual value and their value if they had been as represented. Benjamin on Sales, p. 242.

The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. Gen. Code, 8449-6.

In the case of a breach of warranty in the sale of a horse, the measure of damages is the difference in value between the value of the horse as it was and as it should have been if it had complied with the warranty, and in addition such special damages as the buyer suffered by reason of his carriage being injured by the actions of the horse. Smart vs. Teeple, 18 O. C. C., N. S., 544.

Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed. Gen. Code, 8450.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### PERSONAL PROPERTY

#### Question 41.

A dies intestate and part of his estate consists of a twenty year lease-hold, a one-half interest in the real estate and assets of the firm of A & B, of which A was a partner, and one-third of the capital stock of the X company, a corporation that was about to be dissolved, and which owns its factory building.

As between A's heir and his administrator, who is entitled to these items of the estate?

#### Answer 41.

The administrator.

All interests for a definite space, measured by years, months or days, are deemed chattel interests; and, independent of statutory provisions, go to the administrator; but he has no interest in a lease for life. *Warner vs. Tanner*, 38 O. S., 118; 111 Longs. Notes, 960.

No partition by the heirs of a deceased partner can be had of real estate bought with firm funds for firm purposes while there is a claim against the firm outstanding; and perhaps for the further reason that the conversion into personality is out and out in Ohio. *Fisher vs. Lang*, 10 Dec. Rep., 178.

Shares of stock in a corporation shall be personal property, and when fully paid up, be subject to levy and sale upon execution against the owner. Gen. Code, 8682.

Stock in a corporation is personal property, even though the property of such corporation itself is chiefly realty. *Johns vs. Johns*, 1 O. S., 350; 1 Longs. Notes, 986.

#### Question 42.

A, in New York, sells on credit a carload of sugar to B in Cincinnati, and consigns it to B, and delivers it to the common carrier for shipment. After the sugar has been sent, and while it is in the railroad warehouse in Cincinnati waiting to be delivered to B, A hears of B's insolvency, and exercises his right of stoppage in transitu. C, a judgment creditor of B, attaches the sugar while it is in the warehouse, and the railroad company asks you whether it should be delivered to C, or held for A.

What would your advice be?

Answer 42.

It should be held for A.

Goods are in transit within the meaning of the next preceding section (defining stoppage in transitu) from the time they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. Gen. Code, Sec. 8438.

"The right of stoppage in transitu is extinguished only by the actual and complete delivery of the goods consigned to the vendee, or to some agent of and for him.

The seizure of the goods in transitu at the suit of the vendee's creditors does not extinguish the right of stoppage and the vendor on credit may maintain an action for them or their value against the officers making the seizure." Calahan vs. Babcock, 21 O. S., 281; 111 Longs. Notes, 28.

Question 43.

A conveyed to B his factory building in Columbus, and afterwards removed from the premises the following articles; some electric light wall brackets, and a hot water boiler, all connected in the usual way, a sewing machine screwed to the floor, and usually operated by an electric motor, and a small metal automobile garage, that is built on a cement platform behind the factory.

B protest against the removal of all these things and asks you whether he has any cause of action against A for removing any of the articles. How would you advise him?

Answer 43.

B has no cause of action. See Teaff vs. Hewitt, 1 O. S., 511; 1 Longs. Notes, 1002. Wittenmeyer vs. Board of Education, 10 O. C. C., 119; 6 O. C. D. 258.

Question 44.

A, being in possession of B's mill under a contract of purchase, has an agreement with B that all machinery placed upon the premises should become part of the realty. He bought an engine and boiler from C on credit, and gave a chattel mortgage for the purchase price, which C duly recorded. A then affixed the engine and boiler to the real estate in the ordinary manner and then defaulted on his contract with B. A surrendered the building to B with the boiler and engine still attached, and C claims them under his mortgage. Who should prevail?

Answer 44.

C should prevail.

"A provision in a sale of machinery put into a factory as a fixture, requiring a mortgage to secure deferred purchase money, preserves the chattel character of the property, as against a subsisting mortgage of the realty." *Hine vs. Morris*, 7 Dec. Rep., 482.

Question 45.

A's automobile is stolen and the thief sells it to B, a bona fide purchaser. A later discovered the automobile in the possession of B, who told him that he had purchased it in good faith from an automobile salesman. B has had installed in the machine an electric starter at the cost of \$150 and he refuses to return the machine to A unless he is paid for the improvement. A brings a replevin action against B for the recovery of the automobile. Should he prevail?

Answer 45.

A should prevail. "The doctrine of caveat emptor certainly applies to the purchaser. He was bound to know that the seller of the automobile was the owner of it, and if he purchased it (although in good faith) when in fact the seller had no right to dispose of it, he cannot claim title by reason thereof. If, after getting possession of the automobile in question, he placed repairs on a car the ownership of which was in some person other than the one who claimed to be the owner of it at the time the said purchaser bought it, and of whom the said seller claims to have purchased, the last purchaser placed repairs thereon at his own peril and, as against the rightful owner of the car, cannot legally hold the permanent repairs placed thereon." *Keller vs. Evans*, 31 O. C. A., 545; O. L. R., May 2nd, 1921.

Question 46.

A is tradesman whose credit is excellent. B is another tradesman in the same town, whose credit is not excellent. B wrote to C in the name of A and ordered C to forward large quantity of potatoes. C shipped the potatoes over the railroad, and consigned them to A. When the potatoes arrived, B called on A and said that he had ordered some potatoes from C and that they had arrived, but that through some error, they had been consigned to A instead of himself. He requested A to sign the receipt for the goods to be presented to the railroad. A believed B's statement to be true and signed the receipt and the railroad delivered the po-

## OHIO SUPREME COURT

tatoes to B. B sold them and absconded with the proceeds.

Who besides B, is liable to C?

**Answer 46.**

The purchaser from B is liable to C. "Where a dealer gets an order for goods by letter signed by W. A., and finding that W. A. was of good standing, ships the goods, and then learning that there was another W. A. in the town of no standing and the latter gets the goods before the dealer can intercept them and ships them elsewhere to other buyers, the dealer has not parted with his title, for he did not intend to sell to the other W. A. and can recover as for conversion from a buyer from such." Block vs. Peebles, 10 Dec. Rep., 3; 18 Bull, 36. See Hamet vs. Letcher 37, O. S. 358.

The carrier is liable to C.

"The obligation of a common carrier of merchandise is to carry to the destination and deliver to the consignee named in the address, unless prevented by the act of God or the public enemy; and delivery to a wrong person, not induced by some act or representation of the consignor, is not excused by any degree of care which the carrier may exercise." Oskamp Nolting Company vs. Southern Express, 61 O. S., 341. IV Longs. Notes, 811.

# OHIO STATE BAR EXAMINATION

JUNE, 1920

## PERSONAL PROPERTY

### Question 47.

What are the necessary requisites in the conversion of a chattel into a fixture?

### Answer 47.

Whether a chattel is a fixture, in the sense of passing under a deed of the realty, is determined as a question of fact, the following being the elements of consideration in the matter:

1. Contract of the parties.
2. Nature of the subject matter.
3. Manner of annexation.
4. Effect of removal. *Mfg. Co. vs. Garven*, 45 O. S., 289.

### Question 48.

A farmer died intestate in the month of April leaving heirs. An administrator was not appointed until the June following and at once proceeded to cause an inventory to be made. Upon the farm he found a crop of growing winter wheat, a crop of corn planted in May, cord wood chopped from standing timber in March, a crop of growing cherries and several rolls of new wire fence.

Which of the foregoing items are assets to be administered by the administrator and which are not? Give reasons as to each item.

### Answer 48.

The growing winter wheat goes to the administrator. *G. C. 10642*—the emblements or annual crops raised by labor, whether severed from the land or not, from the land of the deceased at the time of his death, shall be assets in the hands of the executor or administrator, and be included in the inventory.

The corn planted in May goes to the heirs. *Millikin vs. Welliver*, 37 O. S., 468.

The cord wood chopped from the standing timber in March was converted into personal property at that time, so goes to the administrator. 1 *Schouler of Per. Prop.*, 3-5.

Standing growing trees are a part of the land. *Clark vs. Guest*, 54 O. S., 298.

The crop of growing cherries is a part of the realty and goes to the heirs. Timber, fruit trees, grass and the like, not resulting directly from the care and labor of the tenant, are not emblements. 1 Schouler on Per. Prop., 104, 105.

The rolls of new wire fence go to the administrator. Materials prepared by a decedent for building are personal property. Gray vs. Hawkins, 8 O. S., 449; 11 Longs., 358.

Question 49.

How can a prospective purchaser of goods which he intends to inspect avoid the application to himself of the doctrine of caveat emptor?

Answer 49.

If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed. Gen. Code, 8395-3.

A GENERAL warranty does not extend to defects made known to the buyer, or apparent on casual observation, and which cannot but be understood by him to their full extent.

Therefore the only way in which a prospective purchaser can protect himself under these circumstances, is to take a SPECIAL warranty against the consequences growing out of patent defects. R. M. Benjamin on Sales, p. 39.

Question 50.

- (a) What are choses in action? Give examples.
- (b) What are chattels real? Give examples.

Answer 50.

Choses in action is such a species of personal property as where a man hath not the occupation, but merely the bare right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action at law, from whence the thing so recoverable is called a thing, or chose in action.

A right of action on a contract is a chose in action, as is also the right to recover in a tort action. Blackstone, Vol. 2, p. 397.

Chattels real are interests issuing out of, or annexed to real estates; of which they have one quality, viz. immobility, which denominates them real; but want the other, viz. a sufficient, legal, indeterminate duration; and this want is what constitutes them chattels.

All interests in land which are less than freehold, are chattels real. Estates for years and estates from year to year are examples. Blackstone, Vol 2, p. 386.

## BAR EXAMINATIONS

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Question 51. *Vendor and Buyer*

(a) A client comes to you and says, "I sold and delivered goods to B yesterday believing him to be solvent. Today I find that he is not only insolvent, but that he bought the goods knowing that he is not able to pay, and that he does not intend to pay for them." What remedy would you advise your client to pursue?

(b) Suppose that in addition to the facts stated in the preceding question, it should appear that B had transferred the goods to C in consideration of the cancellation of a note held by C against B, what course would you pursue?

Answer 51.

(a) A contract for the purchase of goods on credit, when made with intent on the part of the purchaser not to pay for them, is fraudulent.

If the purchaser had no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. *Talcott vs. Henderson*, 31 O. S., 162.

Fraud of the buyer in obtaining sale of goods to him on credit, entitles the seller to replevin the goods. *Grever & Sons vs. Taylor et al*, 53 O. S., 621.

(b) Goods obtained by fraud, and transferred to another in payment of a pre-existing debt, can be replevined from the transferee, as he is not a bona fide purchaser for value. *Eaton & Co. vs. Davidson*, 46 O. S., 355.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**PERSONAL PROPERTY**

**Question 52.**

- (a) Define personal property.
- (b) What are the essentials to a full and complete title or ownership to personal property?

**Answer 52.**

(a) Blackstone defines personal property as that species of property which lacks the elements of immobility and indefinite duration. Things movable or separate from the realty, interests in land less than free-hold, and rights not yet reduced to possession, all constitute personal property.

(b) To hold complete title to personal property a person must have the actual possession coupled with an indefeasible right to possession.

**Question 53.**

(a) What is confusion of goods; and how will a wilful confusion of goods affect the ownership thereof?

(b) When may a person replevin his goods from another person?

**Answer 53.**

(a) Confusion of goods is said to be a mixture of the goods of two or more persons so that they cannot be distinguished.

Wilful mixture of goods is caused by the wilful action of one party without the others consent, and the one causing the mixture must separate them at his own peril. Bispham on Equity, Par. 86.

(b) A plaintiff may replevin his goods from a defendant when the plaintiff is the owner of the property, or has an interest therein, and when the property is wrongfully retained by the defendant. Gen. Code, 12052.

**Question 54.**

- (a) What is a gift inter-vivos?
- (b) What is a gift causa mortis, and what are the necessary elements?

**Answer 54.**

(a) A gift inter-vivos is a voluntary, immediate and absolute transfer of property without consideration made



## BAR EXAMINATIONS

by one or more persons, without any prospects of immediate death, to one or more persons. Without actual possession, the title does not pass.

(b) A gift causa mortis is a gift of personal property made under the apprehension of impending death. It may be oral, and delivery is essential to pass title. The gift does not take effect until the death of the giver, and may be revoked at any time before death. See Gardner on Wills, p. 10.

### Question 55.

(a) You rent a farm of A, but no time is fixed for the termination of your occupancy of said farm as such tenant. You sow a crop of wheat in September. In December A notifies you to leave the premises March 1st. To whom does the crop of wheat belong and what are the rights of the owner?

(b) Can personal property be subjected to limitations like estates in land?

### Answer 55.

(a) The doctrine of emblements applies to this situation. If the crop of wheat cannot be harvested until after March 1, the tenant or his representative has a right to re-enter on the premises and harvest the wheat, notwithstanding the termination of the tenancy. This because, the tenancy was of uncertain length and was determined not by the act of the tenant.

(b) Yes the rules of the Common Law there could be no future property, to take place in expectancy, created in personal goods and chattels: the property being transitory, and by many accidents subject to be destroyed or otherwise impaired, and the exigencies of trade requiring a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were tolerated in personality.

A familiar example at the present time of the limitation of a future interest in personal property is where corporate stock is given to one for life with remainder over to others after the life interest.

### Question 56.

A and B are of full age and under no restraint. A is the owner of a store doing a general merchandise business at retail. B desires to purchase of A the entire business, stock and fixtures. They agree upon the price and terms of sale. Both A and B come to you and employ you to act for

## OHIO SUPREME COURT

both parties in closing the deal and making the transfer and to fully protect both parties. How would you proceed and what would you require of both parties?

(b) A dies intestate leaving his widow and four children. An administrator is appointed. The estate of A after paying all debts and year's allowance to widow, amounts to \$20,050. State the account showing distribution.

(c) In the last question above, in whom is the title to the \$20,050 before distribution?

**Answer 56.**

(a) In this case the parties must comply with the Bulk Sales Law, which is set forth in General Code 11,102. The purchaser must demand and receive from the seller, a written list of the names and addresses of the creditors of the seller, with the amount of the indebtedness due or owing to each, and certified by the seller under oath, to be a full and accurate and complete list of his creditors, and of his indebtedness; and the purchaser must at least five days before taking possession of the store and fixtures or paying therefore, notify personally, or by registered mail, every creditor whose name and address appears in the said list, or of which he has knowledge, of the purposed sale and of the price, terms and conditions thereof.

Failure to comply with this act would subject the purchaser at any time within ninety days after the sale, upon application of any of the creditors of the seller, to become a trustee of the property conveyed and be accountable to such creditors for all the merchandise and fixtures which would have come into his possession by virtue of the sale.

(b) General Code 8592 provides that if a person dies intestate leaving children or their legal representatives, the widow or widower will be entitled to one half of the first \$400.00 and to one third of the remainder of the personal property subject to distribution.

Under this rule the widow will be entitled to \$6,750.00 out of the fund, and each of the four children to \$3,325.00.

(c) The title to the money before distribution is vested in the administrator, and the beneficiaries derive their title from him.

**Question 57.**

(a) What are chattels real?

(b) Are chattels real classed as personal property?

(c) What is the particular feature that distinguishes chattels real from chattels personal?

## BAR EXAMINATIONS

(d) Name an estate or interest in real estate that is a chattel real.

Answer 57.

(a) Chattels real are interests in land, or which concern land, or savor of the realty, where the interest is less than a free-hold. Blackstone Comm., Vol. 2, Chap. 24.

(b) Chattels real are classified as personal property. Blackstone Comm., Vol. 2, Chap. 24.

(c) Chattels real have the element of immobility, which chattels personal have not.

(d) A term for years in land is an example of a chattel real.

Question 58.

(a) Define Personal Property.

(b) What are chattels?

(c) How is title to personal property obtained and passed?

(d) Define the term "fixtures."

(e) What are the factors to determine whether a chattel becomes a fixture or not?

Answer 58.

(a) According to Blackstone, whatever lacks either of the two qualities, in definite duration as to time, and immobility as to place, is personal property; so that the term embraces at common law all those things in which one may have a right to the exclusion of others, which are not included under the term real property. 1 Schouler on Per. Prop, Sec. 2-6.

(b) Every species of property, movable or immovable, which is less than a free-hold is a chattel, or, in other words, is personal property. 1 Schouler, Sec. 9.

(c) 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration. Blackstone's Comm., Vol. II, Chap. 26.

(d) Schouler defines a fixture to be a personal chattel which a temporary occupier has annexed to the land, and which he or his representatives may afterward sever and remove against the will of the owner or successor to the free-hold. Some writers, however, apply the term quite dif-

## OHIO SUPREME COURT

ferently, and define fixtures to be those articles of personalty which, by being annexed to the real estate, become a part of it, so as to be incapable of removal without the owner's permission. In view of this confusion, Schouler adds that it would be well to designate fixtures as chattels, annexed in a manner to the ground, concerning which the right to remove might be in controversy between the temporary occupier or his representatives and the owner or successor to the freehold. 1 Schouler, Sec. 112.

(9) Contract of the parties; Nature of the subject matter; Manner of annexation; Effect of removal.

The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the NATURE of the article affixed, the RELATION AND SITUATION of the party making the annexation, the structure and the mode of annexation, and the purpose or use for which the annexation has been made. Teaff vs. Hewitt, 1 O. S., at 530.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### PERSONAL PROPERTY

#### Question 59.

A was the lessee of a farm of 160 acres from B under a five-year lease duly executed and recorded, and under which he took possession of the farm and lived thereon for a year when he died intestate leaving no widow but two children as his only heirs at law. C, one of the children, a few weeks after A's death bought the farm from B and entered into possession. D the daughter and other heir, insisted that the lease was the subject of administration and applied for letters of administration upon her father's estate, setting out that his personal estate consisted of a lease for the unexpired period of four years.

State whether or not administration could be had and if the contention of D was correct?

#### Answer 59.

A lease for years, being a chattel interest, passes, at the death of the lessee, to the personal representative, who becomes, by virtue of his office, assignee of the term, and the law specifically appropriates the profits of such leased premises, to an amount equal to the rents reserved in the lease to the benefit of the lessor. Hence, if such representative enters into possession of the leased premises and receives such profits, he becomes personally liable to the lessor for accruing rents to the extent of the profits of the premises during such occupancy.

In such case the lessor has an election either to look to the estate of the deceased alone for such rents, or to hold the representative personally liable therefor. *Becker vs. Walworth*, 45 O. S., 169.

Therefore, the contention of D was correct and an administration could be had.

#### Question 60.

A was a renter from B from month to month. The house contained no gas fixtures or connections. A, without notice to B, installed gas pipes and wired the house for electric lighting from cellar to attic, and attached fixtures to the pipes and electric cut-outs. B sold the house to C and upon notice to move A started to take out the fixtures,

and B and C together enjoined A. What are the respective rights of the different parties and could the action in injunction be maintained?

**Answer 60.**

From the fact that A was a renter from month to month, it can be inferred that he had no intention to improve the free-hold. Therefore, the fixtures to the pipes and electric cut-outs could be removed by A, and as to them the injunction should not be granted.

The gas pipes installed and the electric wiring are permanently attached to the freehold, and as to them the injunction should be granted.

"Chandeliers and other gas fixtures and a mantel mirror, held to the wall by iron clasps, are not fixtures, but personalty, as between an execution creditor and a real estate mortgagee. Contra, of bookcases, to remove which would be to remove part of the washboard around the floor, or a hat rack built into the room." Insurance Co. vs. Kneisley, 9 Dec. Rep., 432; 13 Bull., 437.

There is a misjoinder of the parties plaintiff in the injunction suit, C being the proper party plaintiff.

**Question 61.**

A was the owner of an automobile which was stolen by B. B traded the stolen property to C taking in return as part of the trade another machine. C had no knowledge that the machine taken by him was stolen. C then sold the stolen machine to D. D then put repairs upon the machine to the amount of \$150. A upon discovering that D had the stolen machine, brought suit in replevin to recover the same. D set up the fact that he was an innocent purchaser, and further stated that he was entitled to recover for repairs made on the machine. Could A maintain his action in replevin and recover the machine from D, and could D recover in any event for the repairs placed upon the machine?

**Answer 61.**

A can maintain the action in replevin and recover the machine from D, and D cannot recover for the repairs placed upon the machine.

"The doctrine of caveat emptor certainly applies to the purchaser. He was bound to know that the seller of the automobile was the owner of it, and if he purchased it (although in good faith) when in fact the seller had no right to dispose of it, he cannot claim title by reason thereof. If, after getting possession of the automobile in question, he

## BAR EXAMINATIONS

placed repairs on a car, the ownership of which was in some person other than the one who claimed to be the owner at the time he purchased it, and of whom he purchased, he, the purchaser of the car, placed such repairs thereon at his own peril, and, as against the rightful owner of the car, cannot legally hold the permanent repairs placed thereon. *Keller vs. Evans*, 31 O. C. A., 545; O. L. R., May 2nd, 1921.

### Question 62.

A died testate, and his last will and testament contained the following provision:

"Upon the death of my wife, I hereby direct my executors to immediately sell all my real estate I die seized and possessed of, and divide the proceeds therefrom, after the payment of my debts, equally among my children, share and share alike, and said executors are authorized to make good and sufficient deeds to the purchasers thereof."

At the time said will was filed for probate, the wife of A was dead. What effect, if any, had the language of this will upon said real estate, and was the same the subject of administration if no debts or expenses existed.

### Answer 62.

The language of the will operates to vest the title to the real estate in the executors, and, no debts nor expenses existing, the same is not the subject of administration.

A testator by his will gave to his widow certain real estate so long as she should remain his widow, and directed that the balance of his real estate and personal property should be sold at public or private sale, and the proceeds be applied to the payment of all his just debts and funeral expenses; and provided that, after all of his said debts were paid, then, should his said widow prefer her legal share in the residue rather than the real estate so given her, said real estate should be also sold, and she should have her legal share of the estate; and provided, that after his said widow received her legal share as she should desire, the balance of his estate should be divided among his six children, naming them. The widow elected to take her legal share in the residue of the proceeds of the sale of all the said property after the payment of the said debts; and for a valuable consideration released her interest in the said proceeds to the children of the testator named in the will. The testator appointed two executors with full power to execute the will as therein directed.

## OHIO SUPREME COURT

### HELD:

(a) That the direction to sell the real estate was not left discretionary with either the executors or the heirs; but that the direction to sell was imperative, and the only discretion given the executors is as to the manner of sale.

(b) That under the direction to sell, the real estate is to be regarded, for the purpose of distribution, as converted into money; and the beneficiaries take, at the death of the testator, a vested interest in the proceeds of sale.

(c) That the imperative direction to sell the real estate, and the unconditional requirement to distribute the proceeds among the beneficiaries named, are powers coupled with an interest; and, by force of the will, the title to the real estate of the testator vests in fee in his executors, and does not descend to his heirs.

(d) That the duty of making the sale and the distribution of the proceeds devolves, by the will, upon the executors, and not upon his heirs.

(e) That the executors take the fee in the real estate, and with it the right of possession; and the executors may maintain an action for possession, against one wrongfully in possession, and the heirs are not necessary parties. *Martin et al. Exrs. vs. Spurrier*, 13 O. C. D., 110.

### Question 63.

(a) Define a Chattel Mortgage.

(b) What are the provisions contained in what is known as "The Bulk Sales Act?"

(c) What is the purpose of the Writ of Replevin?

### Answer 63.

(a) A chattel mortgage is the transfer of, the title to personal property as a security for a debt or obligation, upon condition subsequent, express or implied, that payment of the debt when due and payable, or a discharge of the obligation, shall operate as a defeasance and revest the title in the mortgagor, but, on default of payment or discharge of the obligation, the title shall become absolute in the mortgagee. *Smith on Per. Prop.*, Par. 143.

(b) The sale, transfer or assignment, in bulk, of any part or the whole of a stock of merchandise, or merchandise and the fixtures pertaining to the conduct of the said business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the business of the seller, transferor or assignor, shall be void as against the



## BAR EXAMINATIONS

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creditors of the seller, transferror, assignor, unless the purchaser, transferee or assignee demands and receives from the seller, transferror or assignor a written list of the names and addresses of the creditors of the seller, transferror or assignor, with the amount of the indebtedness due and owing to each and certified by the seller, transferror or assignor, under oath, to be a full, accurate and complete list of his creditors, and of his indebtedness; and, unless the purchaser, transferee or assignee shall, at least five (5) days before taking possession of such merchandise, or merchandise and fixtures, or paying therefor, notify personally, or by registered mail, every creditor whose name and address appears in said list, or of which he has knowledge, of the proposed sale and of the price, terms and conditions thereof. Gen. Code, 11102.

Sellers, transferrors and assignors, purchasers, transferees and assignees under this act, shall include corporations, associations, co-partnerships and individuals, but nothing contained in this act shall apply to sales by executors, administrators, guardians, receivers, trustees in bankruptcy or by any public officer under judicial process. Gen. Code, 11103.

Any purchaser, transferee or assignee, who shall not conform to the provisions of this act, shall at any time within ninety days after such sale upon the application of any of the creditors, of the seller, transferror, or assignor, become a trustee and be held accountable to such creditors for all goods, wares, merchandise and fixtures that have come into his possession by virtue of such sale, transfer or assignment, provided, however, that any purchaser, transferee or assignee, who shall conform to the provisions of this act shall not in any way be held accountable to any creditor of the seller, transferror or assignor, or to the seller, transferror or assignor for any of the goods, wares, merchandise or fixtures that have come into the possession of said purchaser, transferee or assignee by virtue of such sale, transfer or assignment. Gen. Code, 11103-1.

(c) The purpose of a Writ of Replevin is to enable a plaintiff to assert a right to the possession of specific personal property. See Gen. Code, 12051, et seq.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

### **PERSONAL PROPERTY**

#### **Question 64.**

(a) In what ways may a contract for the sale of personal property be made?

(b) What warranties are implied in a sale generally?

#### **Answer 64.**

(a) A contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties. Ohio Gen. Code, 8383.

A contract to sell or a sale of any goods or choses in action of the value of twenty-five hundred (\$2,500.00) dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive them, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent in that behalf. Ohio Gen. Code, 8384.

(b) In a contract to sell or a sale, unless a contrary intention appears, there is—

(1) An implied warranty on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of a contract to sell he will have the right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quite possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale, from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods which a third person has a legal or equitable interest. Ohio Gen. Code, 8393.

## BAR EXAMINATIONS

### Question 65.

(a) In the absence of any agreement, where, in the sale of goods, is the place of delivery?

(b) If no time is fixed for delivery of goods, within what time must they be delivered?

### Answer 65.

(a) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business, if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(b) When by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. Ohio Gen. Code, Sec. 8423.

### Question 66.

(a) Where goods are delivered to the buyer and he refuses to accept them, having the right to do so, is he bound to return them to the seller? Why?

(b) In what manner is personal property disposed of, in Ohio, if decedent dies intestate.

### Answer 66.

(a) Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them. Ohio Gen. Code, 8430.

(b) When a person dies intestate and leaves personal property, it shall be distributed in the manner prescribed in Section 8574, as to real property which came not by descent, devise or deed of gift from an ancestor; saving, however, such right as a widow or widower may have to any part of such personal property. But a fund in the hands of an administrator, guardian, assignee or other trustee, arising from the sale of real estate which came to such intestate by descent, devise or deed of gift from an ancestor, shall descend according to the course of descent prescribed by Section 8573, for ancestral real estate. Ohio Gen. Code, 8578.

## OHIO SUPREME COURT

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Question 67.

- (a) What is a conditional sale contract?
- (b) What are the rights of the parties in a conditional sale contract?

Answer 67.

(a) When personal property is sold to a person, to be paid for in whole or part in installments, or is leased, rented, hired or delivered to another on condition that it will belong to the person purchasing, leasing, renting, hiring, or receiving it, when the amount paid is a certain sum, or the value of the property, the title to it to remain in the vendor, lessor, renter, hirer or deliverer thereof, until such sum or the value of the property or any part thereof has been paid, such condition, in regard to the title so remaining until payment, shall be void as to all subsequent purchasers and mortgagees in good faith, and creditors unless the conditions are evidenced by writing, signed by the purchaser, lessee, renter, hirer or receiver thereof, and also a statement thereon under oath, made by the person so selling, leasing or delivering the property, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that it is a copy, be deposited with the county recorder of the county where the person signing the instrument resides at the time of its execution, if a resident of the state, and if not such resident, then of the county in which the property is situated at the time of the execution of the instrument. Ohio Gen. Code, 8568.

(b) When such property except machinery equipment and supplies for railroads and contractors, for manufacturing brick, cement and tiling, and for quarrying and mining purposes, is so sold or leased, rented, hired or delivered, the person who sold leased, rented, hired, delivered or his assigns, or the agent or servant of either, or their agent or servant, shall not take possession of such property, without tendering or refunding to the purchaser, lessee, renter or hirer thereof or any party receiving it from the vendor, the money so paid after deducting therefrom a reasonable compensation for the use of such property, which in no case shall exceed fifty per cent of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in the contract or not, unless such property has been broken, or actually damaged, when a reasonable compensation for such breakage or damage shall be allowed. But the vendor shall not be required to tender or refund any part of the amount so paid unless it

## BAR EXAMINATIONS

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exceeds twenty-five per cent of the contract price of the property. Ohio Gen. Code, Sec. 8570.

### Question 68.

A sold B a horse for \$100.00. B agreed to pay for the horse in ten days, but failed to do so. A then went to B's barn and took the horse away.

- (a) What are A's rights?
- (b) What are B's rights?

### Answer 68.

- (a) Judgment for \$100.00.
- (b) Replevin under General Code, Sec. 8434.

Where goods were sold and delivered to the vendee without any reservation of title by the vendor, the latter has no lien for the unpaid balance of the purchase price, and if such vendor takes possession of the goods without the consent of the vendee, he acquires no lien, but becomes a converter. Gillespie vs. Holland, 3 App. 116; 20 C. C., N. S., 17.

### Question 69.

A merchant sold a fur coat to Mrs. B for \$500 and received \$200 in cash. The balance was charged to her account. The following summer Mrs. B placed the coat in storage with the merchant and paid the charges therefor. When she attempted to take the coat from storage the merchant refused to deliver it to her until she paid the balance due on account. Could the merchant thus hold the coat? Why?

### Answer 69.

Yes.

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. Ohio Gen. Code, 8434-2.

## OHIO STATE BAR EXAMINATION.

JUNE, 1919

### TORTS

Question 70.

(a) Distinguish between false imprisonment and malicious prosecution.

(b) What elements must concur in order to maintain an action for malicious prosecution?

Answer 70.

(a) False imprisonment is an injury to personal liberty, while malicious prosecution is an infringement of one's right to reputation.

A cause of action for false imprisonment and one for malicious prosecution though having common elements are based upon different theories, each may be subject to different defenses, and the alleged liability of different parties involved may rest upon different grounds. *Langrueter vs. Iroquois Co.*, 10 O. N. P., N. S., 81; 20 O. D., N. P., 292.

(b) The tort of malicious prosecution arises where judicial proceedings of a certain character, usually criminal, have been instituted or continued with malice and without probable cause and have terminated favorably to the defendant therein. *Chapin on Torts*, p. 476.

In order to maintain an action for malicious prosecution, it must be shown that an action or proceeding has been instituted without any probable cause therefor; that the motive for executing such action or proceeding was malicious and that the prosecution has terminated in the acquittal or discharge of the accused. *Provision Co. vs. Joslyn* 24, O. C. C., N. S., 266.

Question 71.

An employe of a company, without its knowledge and consent, operated the company's automobile in such a negligent manner as to cause injury to a third person. Is the company liable for the injury so sustained? Why?

Answer 71.

No.

"The owner of an automobile is not liable in an action for damages for injuries to or death of a third person

## BAR EXAMINATIONS

caused by negligence of an employe in the operation of the automobile, unless it is proven that the employe, at the time, was engaged upon his employer's business and acting within the scope of his employment." *White Oak Coal Co. vs. Rivoux*, 88, O. S., 18.

### Question 72.

L carelessly and negligently left his horse, which was harnessed and hitched to his wagon, standing in a public street without being properly tied or guarded. The horse ran away and the wagon collided with the wagon of H. H received severe bodily injuries. The collision frightened H's horse which also ran away and broke a plate glass window in C's store.

(a) Has H a right of action against L for his injuries? Why?

(b) Under what conditions, if any, would L and H, or either of them, be liable to C for damages?

### Answer 72.

(a) H has a right of action against L, because his negligence was the proximate cause of H's injuries. See *Duffy vs. Cinti. Street Railway*, 2 O. N. P., 294.

(b) If it was the duty of H to have his horse tied, or guarded, and it was not, he would be liable to C and then L would not be liable to C.

If H was not negligent, then L would be liable to C.

### Question 73.

A waterworks company maintained a reservoir near the city of A. It covered several acres and the banks were precipitous with eight feet of water at the edge. There was a public road 250 feet distant and a driveway to and around the reservoir for the company's use. The reservoir was surrounded by a picket fence with a gate at the driveway. Three children, nine, eleven and twelve years old, in strolling about, came to the fence around said reservoir and finding two pickets off crawled through. After sitting upon the bank for a time the youngest fell into the reservoir and was drowned. An action was brought against the company for the death of the child. What in your opinion should be the result of such action? Why?

### Answer 73.

The defendant is not liable.

It is not the duty of an occupier of land to exercise care

## OHIO SUPREME COURT

to make it safe for infant children who come upon it without invitation, but merely by sufferance." *Railroad Co. vs. Harvey*, 77 O. S., 235.

Question 74.

(a) Mrs. A recovered a judgment against the B. & C. R. Co. for damages sustained through the alleged negligence of the servants of the railroad company in so operating and running an engine in its yards over a public street in the city of N, as to strike her and crush her foot. Amputation of her foot became necessary. The injuries alleged in her case were the loss of the foot as a permanent injury, and the pain and suffering incident thereto. Said judgment was affirmed. Mr. A then brought an action against said R. R. Co., charging his petition the same acts of negligence on the part of the company, and the same injuries to the wife which were contained in her petition. The recovery sought by the husband in his case, is for the loss of the service of the wife which resulted from her injuries, and also for the money expended by him in her surgical and medical treatment in the endeavor to cure and heal them. Has the husband a right to action against the R. R. Co.? Why?

(b) Suppose Mr. A had been injured and had recovered a judgment from the R. R. Co., instead of his wife, and that she filed an action against the R. R. Co., alleging substantially the same facts as Mr. A alleged in his petition, and sought recovery for the loss of her husband's society, companionship, and assistance, to her damages. Would she be entitled to damages? Give reason for your answer?

Answer 74.

(a) Yes.

At common law a husband has a right of action against one who wrongfully or through negligence injures his wife, to recover for the resulting loss of her services and for his necessary medical, surgical and other expenses in healing her injuries; and this right of action is not abridged nor affected by the legislation embraced in Sections 7995 to 8004, inclusive of the General Code. *B. & O. Ry. vs. Glenn*, 66 O. S. 395.

(b) She would not be entitled to damages. "A wife has no right of action against a person for the loss of the CON-SORTUM of her husband caused by personal injuries sustained by him through the negligence of such person." *Smith vs. The Nicholas Building Co.*, 93 O. S., 101.



## BAR EXAMINATIONS

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### Question 75.

X fell over a mortar board, one evening, which projected from a street over the sidewalk in the city of K, and was seriously injured. A permit to use part of the street as a place for depositing building material for the construction of a house on the abutting lot had been obtained from the city. The mortar-board had been placed in the street several days before by one of the employees of the contractor. X sued the city to recover damages for his injuries, averring that the city in violation of its duties authorized and permitted the obstruction of the street with building material, and that it negligently, with full knowledge of the existence of the obstructions in the street, permitted the same to remain there without any safeguards or lights. In whose favor should the court find? Why?

### Answer 75.

Under the state of facts given, the plaintiff should recover. A permit by a municipal corporation to use part of the street for the placing of building materials for use in the construction of a building on the adjacent property is the mere regulation of the right of the property owner to make such use of the street and not a license to do an act in the street which but for such license would be illegal or a nuisance, and a municipal corporation by giving such permit is not charged with the duty of seeing that the place is guarded, and will not be liable in damages to a person injured in consequence of the omission to guard such place with barriers or lights, unless it had notice, express or implied, of such omission, and after such notice was guilty of negligence. *Columbus vs. Penrod*, 73 O. S., 209; *IV Longs. Notes*, 1001; *Contra Cleveland vs. King*, 132 U. S., 295. (post).

A municipal corporation, which had given a permit to use a part of the street for depositing building material, was held not to be liable to one who fell over a mortar board which projected from the street over the curb of one of the sidewalks and was without safeguard or light. *Columbus vs. Penrod supra*.

The Supreme Court of the United States, however, has held that a municipal corporation which has given a permit authorizing the placing of building materials in a street and requiring the same to be marked at night by lights, is liable to one who drove into a mortar box placed in the street, by virtue of such permit and left unguarded and without lights. *Cleveland vs. King*, 132 U. S., 295.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### TORTS

Question 76.

What is a tort?

Answer 76.

A tort is any wrong not consisting in mere breach of contract, for which the law undertakes to give the injured party some appropriate remedy against the wrongdoer. Cooley on Torts, p. 2.

A tort is an action or omission in violation of a duty prescribed by law, giving rise, by virtue of the common law jurisdiction of the court, to a civil action for damages, which is not an action on contract. Hale on Torts, Sec. 1.

Question 77.

How may a tort be redressed?

Answer 77.

Remedies for torts are classified into extra judicial and judicial remedies. The former arising in cases where the law justifies self help, as where a party may, without doing wrong, abate a nuisance, recapture his own goods or re-enter his own land. Judicial remedies are either ordinary—that is, an action for damages, or extra-ordinary, as where a court of equity will grant an injunction to restrain the commission or continuance of actionable wrongs in cases where a judgment for damages would be inadequate? Hale on Torts, Par. 98-100.

Question 78.

- (a) May a corporation be liable for its agent's slander?
- (b) If so, under what circumstances?

Answer 78.

- (a) Yes,
- (b) A corporation is liable for slander uttered by its managing agent while acting within the scope of his employment and in the performance and furtherance of his principal's business, touching the matter in which he was empowered to act. Gas & Electric Co. vs. Black '95, O. S., 42.

## BAR EXAMINATIONS

### Question 79.

A patron of a street railway company reported to the superintendent of the company, misconduct of the conductor, while on duty, toward a passenger. The conductor was discharged. In making the report he was prompted by ill will and desire to secure the discharge of the conductor from the service of the company. Did the patron incur liability to the conductor? Why?

### Answer 79.

No.

A patron of a street railway company incurs no liability to a conductor by reporting to the superintendent of the company such conductor's misconduct while on duty toward a passenger, though in making the report he is prompted by ill will and a desire to secure the conductor's discharge from the service of the company. *Lancaster vs. Hamburger*, 70 O. S., 156; IV Longs. Notes, 971.

### Question 80.

In an action for slander for words which imputed to the plaintiff the crime of stealing a horse, the defendant as a defense pleaded the truth of the defamatory words.

(a) Is that a good defense?

(b) By what degree of proof must the defense be maintained?

### Answer 80.

(a) In an action for a libel or a slander, the defendant may allege and prove the truth of the matter charged as defamatory. Proof of the truth thereof shall be a complete defense. In all such actions, any mitigating circumstances may be proved to reduce damages. Gen. Code, 11342.

(b) By a preponderance of the evidence.

When the defense is the truth of the defamatory words, which words imputed the crime of stealing a horse, it is not necessary that such defense be proved beyond a reasonable doubt. *Bell vs. McGinnis*, 40 O. S., 204.

### Question 81.

Under what circumstances is the defense of "advice of counsel" a good defense to an action for malicious prosecution?

### Answer 81.

If the "advice of counsel" was sought and acted on in

## OHIO SUPREME COURT

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good faith it is a good defense, showing probable cause, the absence of which is necessary to make out a cause of action for malicious prosecution.

Advice of counsel, before whom all the facts known to the defendant were laid, in good faith, is conclusive evidence of probable cause, and it is error to refuse so to charge. C. H. & D. vs. Winnes, 25 O. C. C., N. S., 321.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### TORTS

#### Question 82.

- (a) What is a tort as distinguished from a crime?
- (b) Is there any distinction between an action for tort and an action for breach of contract, if so what is it?
- (c) What is meant by the term Joint Tort Feasors?

(a) A tort is a breach of duty toward an individual, and is redressible by an action for damages, while a crime is a breach of duty toward the public, and is redressible by prosecution on behalf of the public for the punishment of the accused by imprisonment, fine or forfeiture. Crimes may also be treated as torts when they are attended by loss to individuals.

(b) An action for tort is for damages resulting from a breach of legal duty owed by the defendant to the plaintiff. An action for breach of contract is for damages accruing from the breach of rights acquired through agreement, actual or presumed, between the plaintiff and the defendant.

(c) Where several persons join in an offense or injury, they are called joint tort feasors. Bouvier's Law Dictionary.

#### Question 83.

B, a child who has come upon A's premises to play with A's children, is injured by a falling shutter from A's house. It fell because its hinges though originally sound had worn out. This defective condition could have been ascertained by A through the use of ordinary care. What are A's rights?

#### Answer 83.

A is not liable to B.

It is not the duty of an occupier of land to exercise care to make it safe for infant children who come upon it without invitation, but merely by sufferance.

The duty of the owner or occupier of land to persons coming upon it is—

- (1) To invited persons, to exercise reasonable care for their safety.

## OHIO SUPREME COURT

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(2) To licensees, to give notice of hidden dangers or traps.

(3) To trespassers or persons entering without permission, to be careful not to injure them by bringing force to bear upon them. *Railway vs. Harvey*, 77 O. S., 235; IV Longs. 1032.

### Question 84.

The wife of A, being ill, expressed to her doctor a desire for a harmless medicine to the use of which she was accustomed. A called at the drug store of the X Drug Co. for the desired medicine. B, the agent of the latter, without informing himself by whom or for what it was intended to be used, carelessly put up, sold and delivered to A, a poisonous drug. A, supposing it to be what he called for, took it home and gave it to his wife and she drank it in the belief that it was the harmless medicine and instantly died from its effects.

Does a cause of action exist? If so against whom and in whose favor?

### Answer 84.

A cause of action exists against the X Drug Co. A cause of action exists in favor of the estate of the wife of A for causing her wrongful death, and also in favor of A for the loss of his wife's services.

"Ordinary care requires of a person in the business of selling drugs for immediate use by persons who may resort to his store for the purchase of the same, to so conduct himself in and about the business as not to cause injury to persons buying those drugs by reason of the failure to give him the drugs asked for and the giving instead of some other drug or drugs which would be likely to cause injury. And if the said person fails to exercise ordinary care in this respect and as a result of his failure to exercise ordinary care, injury or death is caused to the person using the said drugs, then the said person selling the drugs is liable for the said negligence." *Meyer vs. Flannery*, 18 O. N. P., N. S., 361; Aff. by C. of A. without opinion. *Davis vs. Guarnieri*, 45 O. S., 470.

### Question 85.

C, who has a grudge against B, A's husband, and wishes to make trouble for him, falsely asserts to A, that B has been guilty of serious misconduct. A believing C's statement brings divorce proceedings against B and on the advice of counsel, refuses to hold any communication with him. This causes B to leave for parts unknown. Later A

## BAR EXAMINATIONS

learns that the charges were untrue, but she cannot find B. Is C liable to her.

**Answer 85.**

C is liable to A in an action for damages for loss of consortium. "A wife has a right of action for loss of consortium, where the tort against the husband is a wilful and malicious interference with the family relation." See *Flandermeyer vs. Cooper*, 85 O. S., 327; *Westlake vs. Westlake*, 34 O. S., 621.

**Question 86.**

In intensely cold weather, the plaintiff has left his motor car standing on the street with its engine running to prevent freezing. The defendant passing by, observed that the car was steaming. Fearing that the accumulation steam might cause serious damage the defendant endeavored to find the plaintiff and warn him. Failing in this he shut off the engine with the intention of preventing an accident. The result was that the water froze and the radiator burst. Plaintiff having been put to expense for repairs, now sues. What judgment?

**Answer 86.**

The plaintiff is entitled to recover.

This is an unlawful interference with the possession of the plaintiff. Possession may be disturbed when there has been a taking. Thus it is a technical trespass unlawfully to unhitch a horse from one post and lead him to another. True, only a slight force was exerted; but no particular degree is here required in order to give a cause of action. *Chapin on Torts*, p. 351.

The existence of good motives will, in general, no more operate to legalize an act inherently unlawful than will their absence affect the legality of an act inherently lawful, though, the fact that defendant did what he did with a proper purpose may prevent the jury from imposing exemplary damages.

Thus, where defendant, being sued for trespass for taking corn, pleaded that the corn was in danger of being eaten by cattle, wherefore he removed it to the barn of the plaintiff, the owner, the plea was held bad. Nor is the owner of a lot, who is excavating thereon, justified in going upon the property of his neighbor for the purpose of shoring up the latter's building against his wishes. It matters not that the act was without malice, and was largely prompted by

## OHIO SUPREME COURT

a design to minimize the injury which his neighbor otherwise would have suffered; and this, although, had the building fallen, there might have been no liability. That which is essentially a trespass cannot become lawful from being done with good intentions."

If this is so where a good motive has been shown, it must necessarily be true of a case where it can only be said that bad motive was lacking. **THE LAW DOES NOT ENCOURAGE INTERMEDDLING.** Chapin on Torts, p. 66.

### Question 87.

A, who keeps bees, takes a box of them with him into a railroad train. C another passenger carelessly stumbles over the box and breaks it causing the bees to escape. They sting M and he suffers in consequence substantial injury? He sues A and C. What are his rights against each?

### Answer 87.

A would be liable to M, and C would not be.

Bees are generally admitted to come within the class denominated "*ferae naturae*" rather than "*domitae naturae*" or "*Mansuetae naturae*." While there seems to be little doubt that the bee is "*ferae naturae*," it must be regarded as coming very near the dividing line, because its habits and instincts have been studied and through the knowledge thus acquired, it can be controlled and managed with nearly as much certainty as any of the domestic animals. 62 L. R. A. (Note on liability of owners of bees for injuries done by them.)

The plaintiff tied his horses in the roadway and they were attacked and stung to death by bees from a hive twenty-five feet within the defendant's enclosure. The court affirmed a verdict in this case, in favor of the owner for the value of the horses. *D. H. Parsons vs. Philip Manser*, 119 Iowa, 88. (cited in 97 A. S. R., 283, and note; and 62 L. R. A., 132 and note.)

To some courts the usual test applied to determine the nature of the owner's responsibility for an injury caused by an animal, namely, whether they are *ferae naturae* or *domitae naturae*, has seemed illogical and artificial, and they have preferred to be guided in their determination of the owner's liability for the safe keeping of animals, not so much by their classification into wild and domestic, as by their natural propensity for mischief. (I R. C. L. Animals, Par. 32.



## BAR EXAMINATIONS

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If such an animal (*ferae naturae*) is not securely confined it is plainly a public nuisance, and **SECURITY MUST BE ASSURED UNDER ALL CIRCUMSTANCES.** Id., Par. 29.

C would not be liable to M, because while careless, his negligence was not the proximate cause of the damage.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**TORTS**

**Question 88.**

State the difference between an action upon a contract and one founded upon a tort.

**Answer 88.**

The fundamental difference between an action upon a contract and one founded upon tort is that an action upon a contract is for damages for the breach or curtailment of rights acquired by agreement, while an action in tort is founded upon the breach or curtailment of rights which one inherently has by law in his person, property and reputation.

**Question 89.**

(a) What is meant by the statement that a person "may waive the tort and sue upon contract?"

(b) Give an example to illustrate your answer.

**Answer 89.**

(a) In some cases a party may treat that which is purely a tort as having created a contract between himself and the wrongdoer, and he may then waive the tort and pursue his remedy as for a supposed breach of contract.

(b) Thus, if one without authority sell the property of another, the owner, instead of reclaiming the property or suing the wrong-doer in some form of action for the tort, may sue for the purchase price received, or for the value, as on sale made by himself to the wrong-doer. In either case he makes valid the sale which originally was tortious, waiving the tort in doing so.

**Question 90.**

A, a minor, hired an automobile to drive from Columbus to Cleveland; arriving at Cleveland he loaned the automobile to a friend for use in a race, in which it was destroyed by collision with another car. Is A liable for the loss of the automobile?

**Answer 90.**

The infant has used the thing bailed beyond the scope

of the bailment, and thereby has become a tortious bailee. Under these circumstances his infancy will not save him from liability.

When the infant departs from the purpose for which the bailment was created and to that extent, exercises an unlawful dominion over the bailed chattel, he is then guilty in tort of conversion and his infancy is no defense. *Dobie on Bailments*, p. 18.

Question 91.

A offered for public sale automobile wheels knowing them to be inherently too weak to stand a severe strain. Intending purchasers were not informed in any way of the defect in the wheels. B purchased a set of the wheels and his automobile on which they had been placed was wrecked by one of the wheels collapsing while the machine was going at high speed.

Is A liable? Give reasons.

Answer No. 91.

A is not liable because under this state of fact A has given neither an expressed or implied warranty.

General Code 8395 provides that there shall be no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a sale, except as therein provided, and this case does not come under one of the exceptions provided in that statute.

Question 92.

A induces B to break his contract with C. Is A liable to C? Why?

Answer 92.

A is liable to C. To induce a person, by inducements not unlawful in themselves, to refuse a contract for service, is not illegal; but to break up a service actually entered on is an actionable tort. *Cooley on Torts*, p. 101.

Question 93.

(a) What is the usual measure of recovery in tort actions?

(b) In what actions and upon what theory may exemplary damages be recovered?

Answer 93.

(a) A tort is said to sound in damages, which are the

## OHIO SUPREME COURT

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pecuniary reparations, which the law compels the wrong-doer to make to a person injured by his wrong. In this case the theory upon which the damages are awarded is that they are indemnity to the person injured.

(b) Exemplary damages may be awarded in those tort cases which are accompanied by circumstances of fraud, gross negligence, malice, insult or oppression. The theory upon which these damages are awarded is that the damages are a punishment for the wrong-doer, and as a warning to others not to commit the same wrong.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### TORTS

Question 94.

Name, and at the same time define, three principal rights of a citizen of the United States.

Answer 94.

**LIBERTY**, whether natural, civil or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law.

**NATURAL LIBERTY** is not correctly described as that which might pertain to man in a state of complete isolation from his fellows. But it is the liberty to enjoy and protect those rights which appertain to his nature as a human being living in society with his kind.

**CIVIL LIBERTY** is the power to make available and to defend (under the sanctions of law) those rights which concern the relations of citizen with citizen and which are recognized and secured by the fundamental law of the state.

**POLITICAL LIBERTY** embraces the right to participate in the making and administration of the laws. Black on Constitutional Law, Par. 199.

**THE PURSUIT OF HAPPINESS** is declared by the Declaration of Independence, to be the right of men.

Which means the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. Black on Constitutional Law, Par. 210.

Not to be deprived of life, liberty or property without **DUE PROCESS OF LAW**.

The two terms "due process of law" and "the law of the land" are of exactly equivalent import.

The law of the land means the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

Due process of law requires an orderly proceeding, adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. Black on Constitutional Law, Par. 217.

**Question 95.**

Smith negligently allowed his horse to be at large, unattended, on the highway. Brown negligently ran into and injured Smith's horse. Is Brown liable? Why?

**Answer 95.**

Under the meager state of facts given in this question, Brown would not be liable, because of the **CONTRIBUTORY NEGLIGENCE** of Smith.

However, the question of **PROXIMATE CAUSE** would have to be considered, that is to say, did the negligence of Smith, in a natural and logical sequence of events, unbroken by any new cause, result in the injury. If it did not, Brown would be liable.

Also, the doctrine of **LAST CLEAR CHANCE** might affect the case. For if, notwithstanding the negligence of Smith, there was time and opportunity offered to Brown, and if under these circumstances by the exercise of ordinary care, Brown could have avoided inflicting the injury, Brown would be liable.

**Question 96.**

(a) If your client were confined in jail without just cause, or authority, and against his will, what remedy would you advise for his release?

(b) How would you proceed?

**Answer 96.**

(a) A proceeding in **HABEAS CORPUS**.

A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment, restraint or deprivation. Gen. Code, 12161.

(b) By filing a petition in the Supreme Court, Court of Appeals, Common Pleas Court or the Probate Court. Gen. Code, 12162.

A petition so filed must be signed and verified either by the person whose relief is intended, or by some person for him, and shall specify

1. That the person in whose behalf the application is made is imprisoned or restrained of his liberty.

2. The officer, or name of the person by whom he is so confined or restrained. If both are unknown or uncertain, he may be described by an assumed appellation. The

## BAR EXAMINATIONS

person who served the writ shall be deemed the person intended.

3. The place where he is so restrained or imprisoned, if known.

4. A copy of the commitment or cause of the detention of such person shall be exhibited, if it can be procured without impairing the efficiency of the remedy, or, if the imprisonment or detention is without legal authority, such fact must appear. Gen. Code, 12164.

### Question 97.

A brought an action against B for flooding his farm by a dam, alleging injury to his crops. At the trial it was shown that the flooding of the land by the dam did not exceed one inch and that the crops were uninjured. Was A entitled to damages? Why.

### Answer 97.

A was entitled to damages, this being a technical trespass.

In many trespasses on land there is no real injury, but damages will be assessed with some regard to the motive in committing the unlawful act. The owner's right has been invaded, and the responsibility to respond therefor in pecuniary damages is what he must rely upon for protection against like wrongs in the future. The maxim "*de minimis non curat lex*" which is sometimes applied when one demands that which is insufficient for the mere purpose of vexation, is out of place when the invasion of a substantial right is in question; otherwise the right itself might in some cases be destroyed with impunity.

Since not only would persons of evil disposition and persons merely careless of the rights of others be likely, in their own action, to disregard it when proof of damage was supposed to be unattainable, but reiterated invasions might in time raise a presumption of an adverse right. Cooley's *Elements of Torts*, p. 20.

### Question 98.

A, a farmer, directed B, who was in his employ, to take his team and wagon and procure a load of corn which he had purchased from a neighbor. B obtained the corn but, disobeying orders, drove to the city of L and sold the corn to H & Co. at the market price. He then drove to a livery barn; left A's team and wagon there, and absconded. H & Co. had no knowledge of B's wrongdoing and at once min-

## OHIO SUPREME COURT

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gled the corn with other corn at their elevator. A brought an action against H & Co. for the value of the corn. What should be the result? Why.

**Answer 98.**

A should recover the value of the corn.

B was not authorized by A to act as his agent, being a servant doing a ministerial act.

Under the facts given, no agency by estoppel is created. "The doctrine of estoppel is applicable only to cases where a representative is authorized to make promises or representations, upon which third persons are invited to act, that is, it is applicable to a principal who authorizes his agent to make primary obligations, BUT NOT TO A MASTER WHO NEVER AUTHORIZES HIS SERVANT TO CREATE SUCH OBLIGATIONS." Huffcut on Agency, p. 68.

**Question 99.**

A policeman arrested a minor for the violation of a city ordinance. In making the arrest the policeman unnecessarily beat and bruised said child. Is the city liable in damages for the negligent act of the policeman? Why.

**Answer 99.**

The city is not liable for the acts of the policeman, negligent or otherwise. The city in employing the policeman is exercising a governmental function, and under the maxim, "The king can do no wrong," cannot be held liable. See cases cited in Page's Ohio Digest, Vol. V., Col. 11888.

This doctrine has been somewhat narrowed by recent decisions as to certain governmental agencies, but not as to policemen.



**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

**TORTS**

**Question 100**

(a) At common law, was there any recovery for the wrongful death of a human being?

(b) State the rule and limitations, if any in Ohio.

**Answer 100.**

(a) The common law made no provisions for compensation to parties having an interest in the life of a person when they were deprived of the advantage to be expected therefrom by his life being unlawfully or negligently taken. The private injury was deemed to be swallowed up or drowned in the public injury. Cooley on Torts, p. 9.

(b) When the death of a person is caused by wrongful act, neglect or default, such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances which makes it in law murder in the first or second degree, or manslaughter. When the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person. Ohio Gen. Code, 10770.

Such actions shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death was caused: It must be brought in the name of the personal representative of the deceased person, and the jury may give such damages, as it may think proportioned to the pecuniary injury resulting from such death, to the persons, respectively, for whose benefit the action was brought.. Every such action must be commenced within two years after the death of such deceased person, except as provided in Section 10773-1 of the General Code. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment, may

at any time, before or after the commencement of the suit, settle with the defendant the amount to be paid. The amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment, in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying in this state. Ohio Gen. Code, 10772.

Question 101.

(a) In Ohio a farmer unintentionally cut trees on a neighbor's farm. What is the rule as to measure of damages?

(b) Suppose he intentionally and maliciously cuts them, what is the rule?

Answer 101.

(a) The neighbor is entitled to a money judgment for the value of the trees destroyed.

"Damages have been defined as a sum of money adjudged to be paid by one person to another as COMPENSATION for a loss sustained by the latter in consequence of an injury committed by the former." *Cincinnati vs. Hafer*, 49 O. S., 60.

(b) The neighbor in this case is entitled to recover actual damages plus an amount to be awarded by the jury as smart money, or damages beyond compensation, to punish the party guilty of the wrongful act.

"Exemplary damages may be given in suits involving fraud, malice, and insult." *Roberts vs. Mason*, 10 O. S., 277.

"The principle of permitting damages in certain cases to go beyond naked compensation is for example and the punishment of the guilty party for the wicked, corrupt, malignant motive and design, which prompted the wrongful act." *Telegraph Co. vs. Smith*, 64 O. S., 106.

Question 102.

Can a father be held liable for the tort of a minor child? Explain.

Answer 102.

A father cannot be held liable for the torts of a minor child, simply by reason of the relationship.

"An infant is responsible for his own torts, and a father cannot be held for the independent wrong of his child, but

## BAR EXAMINATIONS

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the father is liable if he was in any way connected with the infant's wrong doing either actively or passively." *Lacker vs. Ewald*, 8 O. N. P., 204.

### Question 103.

(a) A resident of Zanesville, Ohio, committed a tort against his neighbor which was a criminal offense. He was arrested, tried, convicted and punished criminally for the crime. May he or may he not show that fact is mitigation of punitive damages?

(b) Define slander.

(c) What is meant by "actionable per se"?

### Answer 103.

(a) The evidence of the criminal proceeding is not admissible in the civil action. "There is no foundation in the proposition that the civil action was merged in the indictment." *Storey vs. Hammond*, 4 Ohio, 37.

"One of the questions is whether the plaintiffs right of action is merged in the crime committed in the taking and conversion of his property; or whether according to the modern doctrine in England, is suspended until the determination of the criminal prosecution against the offender. The doctrine of the English law that for goods stolen no action lies against the felon before the institution of criminal proceedings against him is not in force in this state.

In this state we have no Common Law offenses; and looking to the origin of the rule, and the reasons upon which it is founded, in connection with the policy of our system of criminal jurisprudence, we regard its adoption here as unnecessary for the purpose of public justice, and, in the absence of legislation to the contrary, as an unwarranted restriction upon the rights of the citizen." *Howk vs. Minnick*, 19 O. S., 462.

(b) "Slander and libel are different names for the same wrong accomplished in different ways. Slander is oral defamation published without legal excuse, and libel is defamation published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.

Defamation is a false publication calculated to bring one into disrepute." *Cooley on Torts*, p. 58.

(c) "Publications are actionable per se when an action will lie for making them without proof of actual injury, because their necessary or natural and proximate consequence

## OHIO SUPREME COURT

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is to cause injury to the person of whom they are spoken, and therefore injury is to be presumed." Cooley on Torts, p. 59.

Question 104.

(a) State the rule in Ohio as to the liability of a property owner to others who stores nitro-glycerine or other highly dangerous substances on his own property which causes an injury?

(b) Explain the difference between proximate and remote cause.

Answer 104.

(a) "Thompson in his Commentaries on the law of Negligence Volume 1, Section 764 states that a recovery may be had for damages to adjoining property from blasting:

1. Where dirt and stones are thrown by the blast upon the adjoining property, irrespective of the question of negligence.

2. Where the work of blasting is done in a situation where it is necessarily dangerous to persons or property, whether the injury proceeds from the impact of rocks thrown or from atmospheric concussion irrespective of the care of screening used.

3. In all other cases liability will attach to the person or corporation carrying all the dangerous employment where the work has been negligently done.

This would seem to be the rule in Ohio. Louden vs. City of Cincinnati, 90 O. S., at p. 154.

(b) "The proximate cause of an event is that in which a natural and continued sequence, not broken by any new cause, produces that event, and without which that event would not have occurred." Railway vs. Simpson, 12 O. C. C., N. S., 185; 21 O. C. D., 349.

"The remote cause is any cause which is not in its nature proximate."

## **OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

### **CONTRACTS**

#### **Question 105.**

John Smith enters into a contract for rendering special personal service to a private corporation for a period of two years at a salary of \$5,000.00 per year. For eight months he faithfully discharges his duties but is discharged at the expiration of said eight months for the reason that the business does not justify his employment?

- (a) What is his remedy?
- (b) What would be the measure of his damages?

#### **Answer 105.**

- (a) An action for damages for breach of contract.
- (b) The rule of damages for the breach of a contract for labor for a specified time is the difference between the contract price and what the market value of the employe's services would be worth at the time of the breach of the contract. *Fordyce vs. Easthope*, 8 O. N. P., 585; 10 O. D., N. P., 610. Affirmed without opinion, 52 O. S., 663.

#### **Question 106.**

- (a) Name the essential elements of a contract in general.
- (b) Of a contract for the conveyance of real estate.

#### **Answer 106.**

(a) 1. In a distinct community by the parties to one another of their intention; in other words, in **OFFER AND ACCEPTANCE**.

2. In the possession of one or other of the marks which the law requires in order that an agreement may affect the legal relations of the parties and be an act in the law. These marks are **FORM AND CONSIDERATION**.

3. In the **CAPACITY OF THE PARTIES** to make a valid contract.

4. In the **GENUINENESS OF THE CONSENT** expressed in the Offer and Acceptance.

5. In the **LEGALITY OF THE OBJECTS** which the contract proposes to effect. *Anson on Contracts*, Pt. II, p. 10.

## OHIO SUPREME COURT

(b) No action shall be brought whereby to charge the defendant upon a contract or sale of lands, tenements or hereditaments or interest in, or concerning them, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized. Gen. Code, 8621.

### Question 107.

(a) Give the rule of law in Ohio on the construction of contracts containing a forfeiture or penalty.

(b) If more than one interpretation of a contract is possible, what rule should obtain in construing the same?

### Answer 107.

(a) Whether a stipulation providing for liquidated damages for the breach of a contract is to be construed as liquidated damages or as a penalty depends upon the intention of the parties to be gathered from the entire instrument.

Doan vs. Ragan, 79 O. S., 372; IV Longs. Notes, 1047.

The following tests are to be applied:

1. Is the subject matter of the contract of such a nature that the actual damages in case of breach will be entirely uncertain and indeterminate?

2. Were the damages evidently the result of calculation and adjustment between the parties at the time the contract was made?

3. Is the stipulation reasonable?

4. What was the intent of the parties?

5. What was the language employed? Cleveland vs. Connelly, 14, O. C. C., N. S., 433; 23 O. C. D., 64. Affirmed No opinion, 75 O. S., 590.

(b) An agreement ought to receive that construction which will best effectuate the intention of the parties to be collected from the whole of the agreement.

Greater regard is to be had to the clear intention of the parties than to any particular words which they may have used in the expression of their intent. Anson on Contracts, Pt. III, Chap. II.

### Question 108.

According to the banking laws of Ohio, there is a limitation on the amount that may be loaned to any one person.

## BAR EXAMINATIONS

Suppose that the bank officials exceed their authority and loan John Smith double the amount that is permitted to be loaned to any one person.

(a) Can John Smith void the contract and avoid the payment, or avoid the payment of the excess above the amount permitted to be loaned to him?

(b) Give reason for your answer.

**Answer 108.**

(a) No.

If the corporation has fully performed on its side, the adversary party cannot plead *ultra vires*. *Hydraulic Co. vs. Railroad Co.*, 29 O. S., 341.

(b) One who has contracted with a private corporation as such, and enjoyed the benefit of full performance by the latter, is **ESTOPPED** from pleading that the contract was *ultra vires* of the corporation when it is sought to be enforced against him. *Constable Bros. vs. Faulhaber*, 15 O. D., N. P., 700.

**Question 109.**

A, B and C purchased three adjoining lots in a subdivision which was restricted. The restrictions provide that no house shall be built within 40 feet of the front property line. A builds his house in accordance with the restrictions and moves in. B constructs his home locating it within 30 feet of the front property line, and has it completed except painting. C starts to stake out his home in violation of the restrictions bringing it within 20 feet of the front property line.

(a) Can A compel B to move his house back to comply with the restrictions?

(b) Can A enjoin C from constructing his house in violation of the restrictions? Give reasons.

**Answer 109.**

(a) No. On account of laches. The remedy, if any, is at law, and not in equity. See *Railway vs. Duncan*, 84 O. S., 463.

(b) Yes.

Where neighboring proprietors of urban lots are bound by a covenant in a deed, under which both hold, not to erect buildings within a prescribed distance from the street upon which the lots abut, either is entitled to an injunction to enforce the observance of the covenant by the other. *McGuire vs. Caskey*, 62 O. S., 419.

## OHIO SUPREME COURT

### **Question 110.**

Explain the difference between "good consideration" and "valuable consideration."

### **Answer 110.**

A **GOOD** consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded upon motives of generosity, prudence and natural duty.

A **VALUABLE** consideration is such as money, marriage or the like, which the law esteems as an equivalent for the grant; and is therefore founded in motives of justice.

Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers. Blackstone's Comm., Vol. II, p. 297.



**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

**CONTRACTS**

**Question 111.**

(a) What is the presumption in law if a tenant holds over after the expiration of a yearly term?

(b) Can this presumption be rebutted? If so, how? If not, why?

**Answer 111.**

(a) If a tenant for years holds over after the expiration of his lease, he becomes, at the option of the landlord, a tenant from year to year. *Moore vs. Harter*, 67 O. S., 250; IV Longs. Notes, 930.

Hence, the presumption is that the tenant has a lease for another year.

(b) The landlord may treat a tenant holding over as a trespasser or as a tenant from year to year; but accepting rent for any part of the time, or acquiescing for any considerable time in the holding over is an election in favor of the tenancy.

*Railroad vs. West*, 57 O. S., 161; IV Longs. Notes, 710. Holding over is not conclusive of an implied agreement to remain for another year, and where a tenant notified a landlord that he desired to remain, but would do so only if certain repairs were made, but on the landlord's subsequent refusal, moved, the implication is rebutted. *Wheeler vs. Crouse*, 1 O. C. C., 234; 1 O. C. D., 127.

**Question 112.**

A, a minor, agreed to buy B's farm for \$5,000 and paid \$1,000 when the contract was signed. He afterwards refused to pay the remaining amount and demanded the return of the amount paid. Can A recover said amount in an action against B? Why?

**Answer 112.**

A is entitled to recover the amount from B.

The general rule of the common law is that an infant's contract is voidable at his option, either before or after he has attained his majority. But the rule is thus limited;

(1) The contract ceases to be voidable if it be ratified upon the attainment of 21 years of age.

(2) The contract cannot be avoided if it be for necessities. *Anson on Contracts*, p. 105.

In Ohio, the power of attorney of an infant is VOID.

## OHIO SUPREME COURT

### Question 113: . . . . .

A purchased a horse at an auction sale from X. The same day A sold the horse to K who agreed to pay X for the horse, X assenting to this arrangement. K did not pay for the horse and X brought suit against A for the purchase price. Can X recover, and why?

### Answer 113.

X cannot recover from A because there was a novation.

"A sold goods to B. B agreed to sell them to C, provided A would accept C as his debtor, which A agreed to do, and B delivered the goods to C; but C refused to pay A and A sued C. It was held that until C promised to pay A, the substitution was not complete; B was not discharged and A had no action against C." *Gill vs. Fawcett*, W. 218; 1 Longs. Notes, 19.

However, in the state of facts given, C (K) did agree to pay A (X) and therefore the substitution and novation was complete.

### Question 114.

H contracted with M for certain specific goods according to sample submitted. When the goods arrived they did not correspond with the sample in quality.

(a) Was H required to accept the goods? Why?

(b) What, if anything, was H required to do, if he rejected the goods, to avoid liability on the contract?

### Answer 114.

(a) H was not required to accept the goods.

In case of a contract to sell or sale by sample, there is an implied warranty that the bulk shall correspond with the sample in quality. Gen. Code, 8396-1.

When there is a breach of warranty by the seller, the buyer may, at his election:

Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. Gen. Code, 8449-1-(d).

(b) Return or offer to return the goods.

When the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. Gen. Code, 8449-4.

### Question 115: . . . . .

A, after contracting with C to build a sawmill for him and furnish materials therefor, performed part of the con-

## BAR EXAMINATIONS

tract but abandoned the work before it was completed. C did not consent to such abandonment, or accept the work unfinished. Can A recover for the work done and materials furnished? Why?

Answer 115.

A, having breached his own contract, cannot recover for the work done and materials furnished.

"Where a contract between A and X is discharged by the default of X, A may consider himself exonerated from any further performance which may have been due on his part; and successfully defend an action brought for non-performance." Anson on Contracts, p. 279.

Question 116.

Miss K, a car cleaner, entered into contract of employment in writing with the Pullman Company, in which contract it was provided that Miss K in consideration of her employment and wages therefor by the Pullman Company would assume all risks of accident or casualty incident to such employment and would release the Pullman Company from all liability therefor.

Said contract further recited that the Pullman Company had a contract of carriage with the Big Four Railroad Company whereby the Pullman Company had agreed to protect the railroad company from any and all liability arising out of the negligence of said railroad company, or its employees, in causing death or injuries to any of the employees of the Pullman Company.

Said contract further recited the substantial terms of such release in the contract between the railroad company and the Pullman Company, and further provided that the Pullman Company might assign its release on the part of Miss K to any railroad company carrying the Pullman Company's cars.

Miss K in the course of her employment was injured by one of the trains of the Big Four Railroad Company. Would her contract prevent a recovery from said Railroad Company? Why?

Answer 116.

Her contract would not prevent a recovery from the railroad company.

"A contract between an employer and employee, which nullifies or lessens any legal duty that the employer owes to the employee relative to the safeguarding of the life, limb, safety, health or welfare of the latter is contrary to public policy and therefore void." Railroad vs. Mary Kinney, 95 O. S., 64.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### CONTRACTS

Question 117.

What is a contract and what are the elements necessary to make a contract?

Answer 117.

A contract is an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others. Anson on Contracts, p. 9.

The elements necessary to a valid contract are:

1. In a distinct community by the parties to one another of their intention; in other words, in **OFFER AND ACCEPTANCE**.
2. In the possession of one or other of the marks which the law requires in order that an agreement may affect the legal relations of the parties and be an act in the law. These marks are **FORM, AND CONSIDERATION**.
3. In the **CAPACITY OF THE PARTIES** to make a valid contract.
4. In the **GENUINENESS OF THE CONSENT** expressed in Offer and Acceptance.
5. In the **LEGALITY OF THE OBJECTS** which the contract proposes to effect. Anson on Contracts, p. 11.

Question 118.

Define "express contract" and "implied contract."

Answer 118.

An express contract is one which is entered into through the spoken or written words of the parties to it.

An implied contract is one which arises by operation of law from the facts and circumstances surrounding a transaction, in accordance with the presumed intention of the parties.

Question 119.

Define "consideration" and how many kinds of consideration are recognized in the law of contracts?

Answer 119.

A valuable consideration is the only kind recognized in Ohio.

## **BAR EXAMINATIONS**

"A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Anson on Contracts*, p. 68.

A covenant to stand seized was held (before the Statute of Uses) to raise a use, if the person in whose favor the covenant was made, stood within a certain degree of consanguinity to the covenantor. Such relationship was of itself a consideration for the covenant, and blood or "good" consideration came to be distinguished from money or valuable consideration which supported the use arising from Bargain and Sale. *Anson on Contracts*, p. 78.

Question 120.

A and B are the owners of adjacent oil lands, and they agreed orally not to sink wells within 200 feet of each other so as to avoid interference with each other.

State whether or not there was sufficient consideration passing between them to make this contract binding.

If so, what kind of consideration was it?

If not, what was lacking?

Answer 120.

There is sufficient consideration to make the contract binding. The consideration consists of a forbearance on the part of each party.

"An oral agreement made between owners of adjoining tracts of oil producing land, whereby they agree not to drill any wells within 200 feet of their division line, is said not to be within the statute of frauds." *Ware vs. Langmede*, 9 O. C. C., 85.

Question 121.

Define what is meant by the Statute of Frauds and Perjuries, and what particular contracts come within its provisions under the Statutes of Ohio?

Answer 121.

The name commonly given to the statute, 29 Car. II, Chap. 3, entitled "An act for the prevention of Frauds and Perjuries." The statute introduced into the law a distinction between WRITTEN parol and ORAL parol transactions, and rendered a writing necessary for the valid performance of the matters to which they relate. The contracts within the provisions of the statute in Ohio are:

1. Any special promise to answer for the debt, default or misfeasance of another person;

2. To charge an executor or administrator upon a special promise to answer damages out of his own estate;

3. To charge a person upon an agreement made upon consideration of marriage;

4. To charge a person upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them;

5. To charge a person upon an agreement that is not to be performed within one year from the making thereof. Gen. Code, 8621;

6. To charge a person upon a contract to sell or sale of any goods or choses in action of the value of twenty-five hundred dollars or upward, UNLESS

—The buyer shall accept part of the goods or choses in action so contracted to be sold, or sold, and actually receive them, or

—Give something in earnest to bind the contract, or in part payment. Gen. Code, 8384.

Question 122.

What is meant by the term "lex loci contractus?"

Answer 122.

The term "LEX LOCI CONTRACTUS" is used in a double sense in many of the cases. It is used sometimes, to denote the law of the place where the contract is made, and at other times to denote the law by which the contract is to be governed, which may or may not be the same as that of the place where it is made. The earlier cases do not regard this distinction and are to be read with this fact in mind.

In the older cases it is held that it is a general principle applying to contracts made, rights acquired, or acts done relative to personal property, that the law of the place of making the contract, or doing the act, is to govern it and determine its validity or invalidity, as well as the rights of parties under it, in all matters touching the modes of execution and authentication of the form or instruments of contract; and also in relation to the use and meaning of the language in which it is expressed, the construction and interpretation of it, the legal duties and obligations imposed by it, and the legal rights and immunities acquired under it.

Dacey on "Conflict of Laws" says that the essential validity of a contract is governed by what he terms the "proper law of the contract" which he defines as the law or laws, by which the parties to a contract may fairly be presumed to have intended the contract to be governed. This may be the law of the place where the contract was made, or it may be the place of performance. Bouvier's Law Dictionary.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

### **CONTRACTS**

**Question 123.**

Give all the elements of a contract.

**Answer 123.**

The elements of a contract as given in Anson on Contracts are as follows:

1. Offer and Acceptance.
2. Form and Consideration.
3. Capacity of Parties.
4. Reality of Consent.
5. Legality of Object.

**Question 124.**

A retail firm gave the agent of a clothing manufacturing company, the firm's order for the first time for a quantity of its product. Shortly thereafter the company advised the firm that because of demands of its regular customers it could not fill the order. Will a suit for breach of contract lie, and if so, what would be the measure of damages?

**Answer 124.**

A suit for the breach of contract will lie, and the measure of damages is the difference between the contract price and the market price.

**Question 125.**

Two brothers, A and B, both minors, subscribe for stock in a corporation. A had paid for one-half of the stock for which he subscribed, while B paid his subscription in full, and received the certificate for his shares. The company failed and went into the hands of receiver for liquidation. Have A and B any rights not common to other stockholders? If so, what are they, and what relief, if any, could you secure for them?

**Answer 125.**

A cannot be held liable for the part of his stock subscription which is unpaid.

Both A and B will be entitled to receive back from the corporation the amount of money paid in for the stock but

## OHIO SUPREME COURT

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it must be paid out of the assets of the company, after the claims of creditors are satisfied.

Question 126.

Give the Ohio Statute of Frauds.

Answer 126.

General Code 8621. No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage, of another person; nor to charge an executor or administrator upon a special promise, to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in, or concerning them; nor upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.

There is also a provisions under Sales Code, G. C. 8384, that sales of personal property of \$2500.00 or over must be evidenced by writing, except in certain cases.

Question 127.

(a) Define void and voidable contracts, and illustrate.  
(b) A member of a city council under a contract of employment with a public utility company, participated in and secured the passage of an ordinance granting the company a right of way over certain streets and public grounds of the city. The company refused to pay him. He sued and on trial proved the services and the contract therefor. The court took the case from the jury, rendered judgment for defendant.

Was the court right or wrong, and why?

Answer 127.

(a) A void contract is one which has no legal effect. An example of this is a power of attorney given by an infant to convey land. A voidable contract is one which can be avoided or set aside at the option of either or both of the parties. Examples of this are an ordinary contract made by an infant; or by and between two infants.

(b) The court's decision was right. The contract of the agent involved inconsistent duties in this case, and



## BAR EXAMINATIONS

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therefore he cannot recover. *Railroad vs. Morris*, 10 O. C. C., 502.

### Question 128.

A agreed orally to sell a residence property to B and while the deed sent to a distant state for signature by one of grantors there residing, he with authority permitted B to occupy the property under agreement that B might hold it for fifteen months in case there was failure to make a good deed. Afterward A reported inability to deliver the deed and ordered B to vacate the premises. In case of suit to eject B, who should prevail, and why?

### Answer 128.

B should prevail in this action. An oral lease for a period of less than three years is invalid in Ohio unless possession is taken thereunder, but if possession is taken thereunder, such oral lease is valid. *Bumiller vs. Walker*, 95 O. S., 344.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### CONTRACTS

#### Question 129.

Latham wanted to buy Clark's automobile and asked Clark to make him a written offer for the sale of it. Clark thereupon wrote giving Latham an option to buy the automobile for \$1,000 any time within a week from that date. The next day Latham called Clark on the telephone and said he did not want the automobile and Clark said "All right." The next day after that, Latham changed his mind and tendered Clark the money and demanded the automobile, but Clark refused. What are the rights of the parties?

#### Answer 129.

Latham has no right of action against Clark. When an offer is rejected by the offeree, the offer will lapse without express revocation, so that a subsequent acceptance will have no effect. Clark on Contracts, p. 36, 37.

#### Question 130.

Brown in Cleveland telegraphed to the Columbus Automatic Sprinkler Company, asking the company to wire him its price on 5,000 Automatic Sprinklers, F. O. B. Columbus. The Columbus Company thereupon sent a telegram to Brown offering to sell Brown 5,000 Automatic Sprinklers at \$5.75 per, F. O. B. Columbus. The telegraph company negligently transmitted that message as \$5.25 per and Brown wrote to the Columbus Company an order for 5,000 Automatic Sprinklers at \$5.25 per. The Columbus Company upon receipt of Brown's order wrote: "We have your order for 5,000 Automatic Sprinklers and will let you have them at \$5.75 per F. O. B. Columbus and not at \$5.25 per, which is not the price we quoted you." Brown replied: "I shall expect you to live up to your telegraphic offer, which was accepted by me," and the Columbus Company thereupon furnished the sprinklers at that price.

(a) Can the Columbus Company recover damages from the telegraph company because of the negligent transmission of that message?

(b) Suppose the Columbus Company had refused

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to sell at the price of \$5.25. Could it have been held liable for such refusal?

**Answer 130.**

(a) No.

(b) No.

Where A telegraphed B asking the latter the price at which he would furnish 5000 sacks of grits, and B, intending to fix the price at  $6\frac{3}{4}$ , sent a message in which, by mistake of the telegraph company, the price named was 6.34, whereupon A answered that he would take 2000 sacks at 6.34 and B replied by letter that "we have your order for two thousand sacks and will let you have them at our price  $6\frac{3}{4}$ ," there was no completed contract to furnish the goods at 6.34 and B is NOT LIABLE FOR FAILURE OR REFUSAL TO DO SO; and B, having elected to furnish the goods at 6.34 is NOT ENTITLED TO RECOVER FROM THE TELEGRAPH COMPANY the difference in price. Postal Telegraph Company vs. Cereal Co., 3 O. C. C., N. S., 259; 13 O. C. D., 516.

**Question 131.**

Adams went to the automobile factory of the Columbus Auto-Car Company and selected an automobile that was in the process of manufacture and agreed with the company to buy it at a certain price when it was completed, at a future date agreed upon between them. The company finished the car, and when it was completed, more than a month before the time Adams was to receive it, the company sold it to Martin at a price in advance of the figure that Adams had agreed to pay. Adams got wind of this transaction through a third person and immediately bought another automobile, but said nothing to the company about the matter. Martin thereafter refused to take the automobile from the company and the latter tendered it to Adams in accordance with the original contract and at the time that had been agreed upon. Adams refused to accept it and then notified the company that he had heard of the sale to Martin, and that he had bought another car, and the company thereupon sued him for breach of contract. What result?

**Answer 131.**

"Specific goods" means goods identified and agreed upon at the time a contract to sell or sale is made.

"Future goods" means goods to be manufactured or ac-

quired by the seller after the making of the contract of sale. Gen. Code, 8456, Par. 1.

The fact that goods are to be made in the future in accordance with specifications does not render them "specific goods." They are "future goods." *Clark vs. Banner Packing Co.*, 31 O. C. A., 285.

A represented to B that he was the sole owner of certain dies and patent rights and thereby got B to contract to purchase a one-half interest in the same; held, that if A procured a reconveyance to himself of the other one-half interest, at or about the time of making the above contract with B, the misrepresentation of sole ownership was **IM-MATERIAL**. *Pumphrey vs. Haffner*, 18 O. C. C., N. S., 346.

Therefore Adams would be liable in damages for the breach of his contract.

**Question 132.**

Thompson, a dentist, rendered professional service to Smith and sent him a bill for \$300. Smith replied that he thought the bill was too high, and offered to pay \$150 which Thompson declined. Smith thereupon sent Thompson a check for \$200 saying: "In order to settle this matter, I enclose you this check in full payment of your bill."

Thompson cashed the check and wrote Smith that he had given him credit for \$200 on account and requested a check for the balance in the sum of \$100.

Smith refused to make any further payment, and Thompson brought suit against him.

What result?

**Answer 132.**

**Judgment for the defendant.**

Where there is a bona fide dispute over an unliquidated demand and the debtor tenders an amount less than the amount in dispute, upon the express condition that it shall be in full of the disputed claim, the creditor has but one alternative; he must either accept the amount tendered upon the terms of the condition, unless the condition be waived, or he must reject it entirely, or **IF HE HAS RECEIVED THE AMOUNT BY CHECK IN A LETTER**, he must return it. Where in such case, the creditor retains a check which was sent upon the condition that it shall be in full satisfaction of the debts claimed to be due, and receives the money thereon and notifies the debtor that the amount is placed to his credit, but that he does not intend that the same shall close up the matter in dispute, to which the

## BAR EXAMINATIONS

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debtor makes no reply, such silence by the debtor does not amount to a withdrawal of the condition which accompanied the tender, nor to a waiver of it. The transaction is an **ACCORD AND SATISFACTION**. *Seeds Grain and Hay Co. vs. Conger*, 83 O. S., 169. See to the same effect, *Insurance Co. vs. Insurance Co.*, 100 O. S., 208.

### Question 133.

On March 1, 1921, Johnson wrote to Brown offering to sell Brown his house in Columbus for ten thousand dollars, offering to give the deed in exchange for the purchase price on June 1.

He concluded his offer with these words:

"If I do not hear from you to the contrary by April 15, I shall consider that you have accepted."

Brown received the offer in due course and never made any reply to it.

On March 15 he decided he would not buy the house, but on April 10 he changed his mind and on June 1 he tendered to Johnson the purchase price and demanded the deed.

Johnson refused to accept the money and to give a deed to the property, and Brown thereupon sued Johnson for breach of contract.

Judgment for whom?

### Answer 133.

The judgment should be for Brown. The offer was unrevoked and was accepted by Brown within the time specified in the offer.

Brown's decision on March 15th, not to buy the house, not having been communicated, did not affect the rights of the parties.

"It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." Anson on Contracts, p. 16.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### CONTRACTS

#### Question 134.

Assuming that time is usually the essence of an executory contract for the sale and subsequent delivery of goods where no right of property in the same passes by the bargain from the vendor to the purchaser, what is the rule in such a case with reference to the acceptance of and payment for the goods when the same are not delivered or tendered on the day specified in the contract?

#### Answer 134.

The goods need not be accepted by the buyer, nor payment accepted by the seller.

"In executory contracts to buy and sell time is of the essence in an action at law." This principle has been strictly applied at least until recent times, not only in regard to personal property, but in regard to real estate. "If A contracts to deliver a horse to B on Monday next, for which B agrees to pay \$100, A cannot recover by an offer to deliver on Tuesday." Williston on Contracts, Vol. II, Sec. 847.

"It is sometimes said that the time for the payment of money is not as essential as the time for other performance. The distinction however may easily be over emphasized. There seems no reason to suppose that in a contract to buy and sell which is wholly executory on both sides, the buyer's tender of money at the agreed day is not as essential to his right of recovery, as the seller's tender of goods at the agreed day is essential in the converse case." Williston on Contracts, Vol. II, Sec. 848.

#### Question 135.

An administrator offered goods for sale upon terms of credit of three months with approved security. A's bid is accepted but it is stipulated that the transaction is to be a sale if sureties be given by ten o'clock the next day, and if not given the goods to be again offered for sale. The sureties tendered by the bidder are not approved by the administrator and the goods are thereupon offered and sold to another. Thereupon the first bidder commenced an action to replevin the goods. Can he maintain the action? Why?

## BAR EXAMINATIONS

### Answer 135.

The action in replevin cannot be maintained.

"Where, at an administrator's sale of goods, upon terms of credit of nine months with approved security, a bid is accepted, but it is stipulated that the transaction is to be a sale if surety be given by nine o'clock the next day, but if not given the goods to be again offered for sale, and the sureties tendered by the bidder are not approved by the administrator, and the goods are thereupon offered and sold to another, the title to the goods does not pass to the first bidder and he cannot maintain replevin for their possession." Bonham vs. Hamilton, 66 O. S., 82.

### Question 136.

A, in consideration of the conveyance by a board of education to him of a lot on which was situated a school house and other buildings suitable for a public school, agreed to convey to the board another lot then vacant, and to remove, reconstruct and rebuild thereon the school house, so that it would be in a suitable and proper condition for school purposes. A fulfilled his part of the contract except to move the school house. In an action for damages against A, he set up the defense that the school building was blown down by a storm and could not on that account be removed as a standing building. Is it a good defense? Why?

### Answer 136.

This was not a good defense.

"The impossibility of performance of the contract by the defendant is supposed to have arisen from the fact that, as the building was blown down, it could not thereafter be removed "as a school house," that is, as a standing building. But, to remove it in that way was not exactly the obligation of the contract. Notwithstanding the school house was blown down by a storm, it remained possible for the defendant to reconstruct and rebuild it on the new school site, and thus perform his contract, not only substantially but strictly and exactly."

"Where, in consideration of conveyance by a board of education, of a lot on which was situated a school house and other buildings suitable for a public school, the vendee agreed to convey to the board another lot then vacant, and to remove, reconstruct and rebuild thereon, the school house, so that it would be in a suitable and proper condition for school purposes, it is not a defense to an action for damages for failure to perform the contract with respect to the

## OHIO SUPREME COURT

school house, that it was blown down by a storm, and could not, on that account, be removed as a standing building. The contract was nevertheless capable of substantial performance." Board of Education vs. Townsend, 63 O. S., 514.

### Question 137.

A entered into a written contract with B, a trustee for a railway company, for the purchase of a parcel of land for \$250, paying \$50 down. By the terms of said agreement A agreed to execute two notes of \$100 each, payable in six and twelve months respectively from the date thereof, on the execution and delivery of a good and sufficient warranty deed. B forwarded to A a quit claim deed for the premises which A declined to accept and returned to B together with the notes and mortgage duly signed. Some time thereafter B transferred the parcel of land to the railway company. The railway company never gave or tendered A a deed and never demanded payment of the balance of purchase price and he never paid the notes and mortgage or the taxes. After more than twenty years the railway company brought suit in ejectment. Should the railway company prevail, and why?

### Answer 137.

The Railway Company has no right to dispossess T, for the reason that it had never performed the contract which it had agreed to perform as to the execution and delivery of the deed." The T., St. L., & W. Ry. Co. vs. Lafayette M. Turney, 7 O. C. C., N. S., 370. Affirmed by the Supreme court without report, 73 O. S., 400.

### Question 138.

On December 8th, A offered to sell to B two thousand to five thousand tons of iron rails on certain term specified, adding that if the offer was accepted A would expect to be notified prior to December 20th. On December 16th, B replied requesting A to enter an order for 1200 tons "as per your favor of the 8th." On December 18th A declined to fill B's order. On December 19th, B, by letter, accepted A's original offer for 2,000 tons of iron rails. A refused to fill the order. What redress, if any, has B?

### Answer 138.

B has no redress.

"When an offer has been rejected it ceases to exist and cannot thereafter be accepted even though the acceptance



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is made within a time which would have been sufficiently early had there been no rejection.

This principle is most commonly illustrated where a counter offer or conditional acceptance which amounts to a counter offer is made by the offeree. This operates as a rejection of the original offer. Williston on Contracts, Vol. I, Sec. 51.

"Acceptance of a written offer to sell must be unconditional. A conditional acceptance of the offer or proposing a different contract is a rejection, and it is then too late to accept the offer." Steel vs. Murphy, 29 O. C. A., 337; 10 O. App., 150.

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### EVIDENCE

Question 139.

In how many ways may testimony of witnesses be taken in Ohio? Name them.

Answer 139.

Three.

The testimony of witnesses may be taken:

1. By affidavit;
2. By deposition;
3. By oral examination. Gen. Code, Sec. 11521.

Question 140.

A, as administrator of B's estate, sued C upon a note payable to B. C answered that he had paid B in the latter's lifetime, the full amount of the note and interest, and on trial offered to so testify. Was his evidence competent?

Answer 140.

C should not be allowed to testify.

A party shall not testify when the adverse party is .....an executor or administrator, etc. Gen. Code, 11495.

Question 141.

In an action to contest a will, may a lay witness, who has previously testified to a long and intimate acquaintance with testator, be asked if, in his opinion, testator mentally was competent to make a will?

Answer 141.

The witness cannot be asked his opinion as to the capacity of a testator to make a will. Such inquiry involves a matter of law; also assumes that the witness knows the degree of capacity required to perform the act in issue. Runyan vs. Price, et al., 15 O. S., 1.

It is not competent, in a proceeding to contest a will, for a witness to give an opinion as to whether the testator had capacity to make a will. But the physical and mental conditions from which it may be determined by the court and jury whether he had such capacity are facts which may

## **BAR EXAMINATIONS**

be shown by evidence of manifestations of such conditions, *Bahl vs. Bahl, et al.*, 90 O. S., 129.

The opinion in *Niemes vs. Niemes*, 97 O. S., 145, does not modify in any degree the rule as established in *Runyan vs. Price*, *supra*.

Neither the probate judge who had adjudged the testator to be an imbecile, nor the attorney who prepared the will and was present when it was signed, were competent to give their opinion as to the capacity of the testator to make a will. *Burns et al., vs. Crowe*, 31 O. C. A., 566; O. L. R., May 9th, 1921.

Motion to require the Court of Appeals to certify its record in this case overruled by the Supreme Court.

**Question 142.**

Will the Common Pleas Court of Franklin county take judicial notice of

- (a) An ordinance of the city of Columbus?
- (b) An ordinance of the city of Cincinnati?

**Answer 142.**

- (a) No.
- (b) No.

State courts cannot take judicial notice of city ordinances in the absence of statute and there is no such statute in Ohio. *Toledo vs. Libbie*, 19 O. C. C., 704.

**Question 143.**

Jones sued Smith for injuries due to the alleged negligence of Smith, who answered, first, by a general denial, and, second, that any injuries sustained by Jones were solely due to his own carelessness. On the trial Smith offered evidence as to the contributory negligence of Jones. Should it have been admitted? Give reasons.

**Answer 143.**

The evidence should have been admitted.

"The allegation that the plaintiff's injury was occasioned by his own fault and negligence does not raise the issue of contributory negligence." *Glass vs. Wm. Heffron Co.*, 86 O. S., 70.

In an action for negligence where the answer of the defendant contains a general denial and an averment that "the death of the deceased was caused wholly and solely through his own fault and without any fault whatever on the part of the defendant" the issue of contributory negli-

gence is not made by the pleadings but is raised by the evidence properly offered by the parties in support of their respective claims. The issue of contributory negligence thus raised is to be determined by the same rules as to burden of proof and otherwise as if made by the pleadings. *Coal Co. vs. McFadden*, 90 O. S., 183.

Question 144.

What degree of proof is required

- (a) To establish a lost will?
- (b) To set aside the probate of a will?

Answer 144.

(a) It is said that in cases where a charge of fraud is involved, the **EXISTENCE OF A LOST OR SPOILATED WILL IS TO BE PROVED**, or cases in which it is sought to prove a contract to bequeath property by will, a mutual mistake sufficient to justify the reformation of an instrument, or to establish a trust, or to show that a deed absolute on its face is a mortgage, and in cases involving kindred questions, the party who seeks relief must establish his right to recover by "clear and convincing" proof. *Merrick vs. Ditzler*, 91 O. S., 256.

(b) In proceedings in contest of a last will and testament, a motion to direct a verdict in behalf of the proponents of the will, at the close of the evidence of the contestants, must be overruled by the court, if some evidence has been offered in support of the issues involved.

The scintilla rule of evidence is to be applied in such proceedings, as in the ordinary jury trial of a civil action. *Clark et al., vs. McFarland et al.*, 99 O. S., 100. To set aside the will, a preponderance by the contestants is required.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

**EVIDENCE**

**Question 145.**

(a) What is an affidavit?

(b) When, if at all, may affidavits be introduced as evidence?

**Answer 145.**

(a) An affidavit is a written declaration under oath, made without notice to the adverse party. Gen. Code, 11522.

(b) An affidavit may be used to verify a pleading, to prove the service of the summons, notice, or other process in an action; or to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law. Gen. Code, 11523.

**Question 146.**

(a) What is the general rule as to introduction of parol evidence to effect written instruments?

(b) Illustrate, by example, an exception to that rule.

**Answer 146.**

(a) Parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument. Jones on Evidence, Par. 434.

(b) Where a deed has been executed with all the formalities required by law, still a plaintiff, in a proper case, can prove that the execution of the deed was induced by fraud, and set it aside.

"It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the most solemn formalities." Jones on Evidence, Par. 435.

**Question 147.**

(a) What is hearsay evidence?

(b) Give an example of hearsay evidence that is admissible.

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Answer 147.

(a) Hearsay evidence is that kind of evidence which does not derive its value solely from the credit to be attached to the witness himself, but rests also in part on the veracity and competency of some other person from whom the witness may have received his information. Jones on Evidence, Par. 297.

(b) Dying declarations, which are declarations made by the victim in cases of homicide, where the death of the deceased is the subject of the charge and the circumstances and cause of the death are the subject of the dying declarations. Jones on Evidence, Par. 331.

In Ohio, by statute, the dying declarations made by a woman who dies as a result of an abortion, are admissible.

Question 148.

A sued B for \$1,000 claimed to be due under a contract for the erection of a building. B by his answer denied all liability, while the case was pending and before trial B by letter offered A \$750.00 if he would dismiss the suit and release him from all claims; this offer A rejected. On trial A offered in evidence the letter of B. Should it have been admitted or rejected? Why?

Answer 148.

It should have been rejected.

Not merely the terms of an offer to compromise, but the FACT that any offer was made is not competent evidence against the offerer, and if admitted will be deemed prejudicial and error. *Sherer vs. Piper*, 26 O. S. 476; *III Longs. Notes*, 321; *Board of Education vs. Mills*, 38 O. S. 383; *III Longs. Notes*, 977.

Question 149.

In what cases, and to what extent, is a party to a suit precluded from testifying?

Answer 149.

A party shall not testify when the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of the child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee or legatee of a deceased person, except:

1. To facts which occurred after the appointment of the guardian or trustee of an insane person, and, in the other cases, after the time the decedent, grantor, assignor or testator died.

## **BAR EXAMINATIONS**

2. When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.

3. If a party, or one having a direct interest, testifies to transactions or conversations with another party, the latter may testify as to the same transactions or conversations.

4. If a party offers evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions.

5. In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless they were made in the presence of the surviving partner or joint contractor. This rule applies without regard to the character in which the parties sue or are sued.

6. If the claim or defense is founded on a book account, a party may testify that it is his account book, that it is a book of original entries, that the entries therein were made by himself, a person since deceased, or a disinterested person not a resident of the county. The book shall then be competent evidence, and may be admitted in evidence in any case, without regard to the parties, upon like proof by any competent witness.

7. If after testifying orally, a party dies, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters.

8. If a party dies and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein.

Nothing in this section shall apply to actions for causing death, or actions or proceedings involving the validity of a deed, will or codicil; and when a case is plainly within the reason and spirit of the next three preceding sections, though not within the strict letter, their principles shall be applied. Gen. Code, 11495.

Question 150.

- (a) What is circumstantial evidence?
- (b) Give an example.

Answer 150.

(a) Circumstantial evidence is proof of facts standing or existing in such relation to the ultimate facts to be

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proven that such ultimate facts may be inferred or deduced from surrounding facts. *State vs. Kerlin*, 51 Bull., 317.

Circumstantial evidence is that which relates to a series of other facts than the fact in issue, which by experience have been found so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion. *Jones on Evidence*, Par. 6.

(b) When footprints are discovered after a recent snow, it is proper to infer that some animated being passed over the snow since it fell; and from the form and number of the footprints it can be determined whether they are those of a man, a bird or a quadruped. *Jones on Evidence*, Par. 6.



**OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

**EVIDENCE**

**Question 151.**

(a) In a jury trial does the judge or the jury or both decide the question of the competency of the witnesses?

(b) The weight of the evidence?

**Answer 151.**

(a) The judge passes upon the competency of the witnesses and the admissibility of the evidence.

(b) The jury decide upon the credibility of the witnesses and the weight of the evidence. 1 Greenleaf, Par. 49.

**Question 152.**

(a) What is meant by the "burden of proof?"

(b) How does a court determine the question as to who has the burden of proof?

(c) Does the burden of proof ever shift?

(d) If so, when.

**Answer 152.**

(a) The expression "burden of proof" has been used in a double sense—

1. As meaning the duty of the person alleging the case to prove it.

2. As meaning the duty of one party or the other to introduce evidence.

The first is the proper meaning of the term, and in fact is implied from the words themselves. McKelvey on Evidence, Par. 30.

(b) The court determines the question in accordance with the rule that the burden of proof rests upon that party against whom a verdict would be rendered were no evidence offered.

(c) The burden of proof never shifts.

After all the evidence is in, whether introduced by the plaintiff or the defendant, it must appear that the person who has the burden of proof has a preponderance of the evidence in his favor, if he would win his case. McKelvey on Evidence, Par. 32.

(d) In the course of a trial upon the various facts in issue, the burden of proceeding may shift from one party

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to the other. The burden of proof, however, remains upon the shoulders of the party who had it at the outset, and is unaffected by the evidence as the trial proceeds. *Id.*, Par. 32.

Question 153.

(a) In what classes of cases are dying declarations admissible?

(b) A was on trial for having unlawfully produced an abortion upon a woman who died in consequence thereof. Were the statements made by her with knowledge of impending death, charging A with the crime admissible?

(c) Why?

Answer 153.

(a) In homicide and abortion cases.

(b) The statements of the woman were admissible.

(c) Gen. Code, 12412-1 provides—

And on such trial (for abortion) the dying declaration of a woman who dies in consequence of the miscarriage or attempt to produce a miscarriage under investigation, as to the cause and circumstances of such miscarriage or attempt, shall be admissible.

Question 154.

(a) To what extent may the cross examination of a witness in Ohio proceed with reference to what has been developed on his direct examination?

(b) What is a subpoena duces tecum?

Answer 154.

(a) The cross examination may go to all the bearings of the examination in chief and to whatever goes to explain or modify it and to all matters connected with the *res gestae*, and it is error to limit it. *Martin vs. Elden*, 32 O. S., 282; *III Longs*, 633.

The rule is quite well established that the limitation upon cross examination rests largely in the discretion of the trial judge, and that only in cases of clear abuse of discretion, resulting in manifest injury to the complaining party will reviewing courts reverse the judgment of the trial court. *Fabian vs. The State of Ohio*, 97 O. S., 184. *Carey vs. State of Ohio*, 70, O. S., 121; *IV Longs*, 969.

(b) A subpoena which directs the person it names, to bring with him any book, writing or other thing under his control, which he may be compelled to produce as evidence. *Gen. Code*, 11503.

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Question 155.

(a). Can the jurors be compelled to testify as to how they arrived at their verdict? Why?

(b) In what classes of cases and in whose behalf can depositions be used in Ohio?

Answer 155.

(a) They cannot. Because it is the policy of the law not to allow their evidence to impeach their verdict. *Kent vs. State*, 42 O. S., 426; *Thompson and Merrium on Juries*, 539.

This doctrine is founded on the soundest principles of public policy, otherwise the rendition of a verdict, in nearly every jury trial, would become merely the beginning of a new controversy over the mode of its rendition, endangering the stability of verdicts and the security of judgments rendered thereon; and the time and attention of the court would be wasted in investigating alleged misconduct of jurors, frequently of the most frivolous character. *Goins vs. State*, 46 O. S., at 472.

### (b) CIVIL CASES.

Either party may commence taking testimony by deposition at any time after service upon the defendant. *Gen. Code*, Sec. 11526.

The deposition may be used only when it is made to appear to the satisfaction of the court that he does not reside in, or is absent from the county where the action or proceeding is pending, or, by change of venue, is sent for trial; or that he is dead, or from age, infirmity or imprisonment, is unable to attend court; or that the testimony is required upon a motion, or where the oral examination of a witness is not required. *Gen. Code*, 11525.

### CRIMINAL CASES.

Provisions may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance cannot be had at the trial, always securing to the accused means and opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witnesses face to face as fully and in the same manner as if in court. *Ohio Constitution*, Art. 1, Sec. 10.

Method of taking depositions under this section is provided in *Gen. Code*, 13668.

client or where the client has already testified in reference to the same matter,

Question 160.

(a) May the terms of a written contract be varied or altered by parol evidence? Explain.

(b) In the proving and construction of a contract may evidence be introduced relating to matters at the time of making the contract, its subject matter, and the purpose of its execution? Why?

Answer 160.

(a) The parol evidence rule is that oral evidence cannot be used to add to, to subtract from, contradict or vary the terms of a written instrument. This is because the oral statements of parties are merged into a higher degree of evidence to wit: a written instrument.

(b) Where the meaning of the language used in the contract is doubtful, and the court cannot ascertain to a certainty what the agreement of the parties was, evidence can be introduced relating to the circumstances of the work for which the contract was made, explanatory of the subject matter, and the purpose and the execution as reflecting on the intention of the parties entering into the contract.

Question 161.

On the cross-examination of a witness the court admitted evidence to show conviction for a crime. The party who called the witness then offered to establish his good character for truth by adducing evidence of his general reputation in that respect. This evidence was also admitted by the court. Did the court err in either instance, and why?

Answer 161.

It was competent for the witness to be asked on cross examination as to his previous conviction for a crime. This because the jury is the judge of the credibility of the witness and the weight of his testimony.

The evidence gives no reference to the good character or reputation of the witness for truth and is not put in issue by this cross examination, and the admission of the question with reference to reputation is error. 98 O. S., 279.

Question 162.

D brought an action to recover damages for the wrongful death of his daughter and defendant answered that it

## BAR EXAMINATIONS

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was not guilty of negligence. On trial of the case the court charged the jury as follows:

"The action, therefore, is one of negligence, and the issue raised is one charging the defendant with negligence and, on the other hand, charging the deceased child with contributory negligence. The burden of proving contributory negligence on the part of the child is upon the defendant, to establish the same by preponderance of the evidence."

Was there prejudicial error in this charge?

Answer 162.

The charge as given was erroneous, as the issue of contributory negligence is not made in the pleadings and except in the case where contributory negligence is put into issue by the pleading, or where the plaintiff's own evidence raises a presumption of contributory negligence, it is error to charge thereon. 73 O. S., 1; 75 O. S., 171.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### EVIDENCE

#### Question 163.

Lawson sued Harvey for damages for malicious prosecution and at the first trial the jury disagreed. Upon the second trial Lawson calls Rogers, Harvey's attorney, and questions him about professional communication with Harvey. These communications are relevant to the case and Harvey testified to them without objection at the former trial. Rogers now objects on behalf of himself and his client to the admission of these communications in evidence and the court excludes them. Later Harvey takes the stand in his own behalf and Lawson cross-examines him about these same communications, and upon Harvey's objection that testimony is again excluded. Were these rulings correct?

#### Answer 163.

The first ruling was correct and the second was not.

An attorney shall not testify concerning a communication made to him by his client in that relation, or his advice to his client. Gen. Code, 11494.

If the client voluntarily testifies, the attorney may be compelled to testify on the same subject. Id.

At whatever stage of the trial, a party offers himself as a witness, he may, on cross examination, be interrogated as to such admissions or communications made to his counsel, and they may be proved by the attorney, either as evidence in chief, or for the purposes of impeachment. King vs. Barrett, 11, O. S., 261.

#### Question 164.

Miller is on trial for a robbery alleged to have been committed Monday, March 7, 1921, in the Terminal Building. The evidence offered by the State is purely circumstantial and the defense is an alibi. In rebuttal the state calls Andrews as a witness and he testified that he knows Miller well by sight and that on the day of the alleged crime and at about the hour when it was claimed that the crime was committed, he saw Miller come out of that building and that on the day after the crime he told these facts to Brown a detective who was investigating the case. Brown is thereupon called as a witness by the state and it was then sought to have Brown testify that Andrews had told him on

## BAR EXAMINATIONS

the day after the crime about the facts that Andrews had given in evidence. This testimony of Brown was excluded by the court.

Was that ruling correct?

Answer 164.

The ruling of the court was correct. The testimony of Brown was purely hearsay, and the facts do not bring the subject matter of his testimony within any of the exceptions to the hearsay rule.

Question 165.

Farmer Smith sued farmer Davis on a promissory note for \$500 secured by mortgage on the Davis farm. Davis asserts that he paid the note on March 1, 1921. As part of his proof that he did so, Davis offers Collins as a witness who would testify that on March 1, 1921, he met Davis on the road to Smith's house, and that Davis had a roll of money in the amount of \$500 in his hand, which he showed to witness, saying that he was going to Smith's to pay that note. Davis also offered a witness Thompson who would testify that on March 1, 1921, shortly after the time that Davis claimed to have made the payment, he met Davis coming out of Smith's farm-yard and that Davis said to him he had just paid off his indebtedness to Smith, and that Smith had said he would deliver up the note and the mortgage to-morrow. What if any of the testimony of Collins and Thompson was admissible?

Answer 165.

The testimony of Collins that he met Davis at the time and place mentioned, and that Davis had a roll of money in the amount of \$500, was admissible.

The testimony of Thompson to the effect that he met Davis at the time and place mentioned, coming out of Smith's farm-yard was admissible.

This for the reason that this testimony has some probative value and is not excluded by any rule of evidence.

What Smith said to either witness was not admissible.

"The declarations of a party in his own favor are not admissible in his behalf." Jones on Evidence, Par. 235.

Question 166.

Upon the death of Smith, no will by him could be found. Smith's wife knows that he had made a will four months before the time of his death, which was in February, 1921, and that he kept this will in a safe in his office. She also

## OHIO SUPREME COURT

knows that for the last two months before his death Smith was confined to his bed at home. She also produced another witness, the nurse, who can testify that Mrs. Smith asked her husband shortly before his death, whether his will was safe and that he had replied: "Yes, it is in my strong box at my office and no one knows the combination but me." Mrs. Smith has another witness, a servant in the house, who can testify that Smith said to her during his last sickness: "You have been a faithful servant Annie, and I have left you \$1,000 in my will. Mrs. Smith offers to prove the will by a copy that had been kept by the attorney who drew it.

What, if any, of this evidence should be received?

Answer 166.

All of the evidence is admissible.

The evidence of Mrs. Smith as to the fact that a will was made, and was kept in a certain safe, is corroborated by the declarations of the testator.

Although there has been considerable discussion of the question and some conflict of opinion, the weight of authority seems to be that subsequent declarations of a testator are admissible to prove the existence and contents of a lost will. Jones on Evidence, Par. 484.

Declarations of the testator are not of themselves alone sufficient to establish the execution of a lost or destroyed will, but are admissible in evidence and have great weight when corroborated by other evidence. Kornfield vs. Kornfield, 22 O. C. C., N. S., 363.

The copy of the will kept by the attorney is competent evidence although secondary evidence, because of the showing that the original cannot be found.

Question 167.

Young is on trial charged with the murder of Kidwell, a boy nine years old. The State calls as a witness Mrs. Adams who testifies Kidwell came to her house wounded in the body and that she asked him what had happened, and that the boy did not answer at once but about an hour later he revived and said that a man had stabbed him just before he came there. The defense objected to that testimony and the objection was overruled. The State thereupon called a doctor who offered to testify that on the next day when Kidwell was at the hospital and shortly before he died and when witness was present in the room, the defendant was brought in and that Kidwell said: "That is the man



## BAR EXAMINATIONS

I told Mrs. Adams about yesterday." This evidence was objected to by the defense and the objection was sustained. The State thereupon asked the doctor what the boy's condition was at the time he made that statement and the doctor replied that he was in a dying condition but had not been told so and had said nothing to indicate that he knew it. The State thereupon again offered to prove the said facts by the doctor and the evidence was again excluded.

Were these rulings correct?

Answer 167.

The first was incorrect. The second and third were correct.

The first because the statement of the boy that a man had stabbed him was a mere narrative of a past occurrence. Jones on Evidence, Par. 345.

The second because the doctor's statement was hearsay. Also, because the statement, although made in the defendant's presence, did not accuse him of the crime, and therefore was not admissible on the theory that it was a confession by silence.

The third because the necessary elements to make the statements admissible as dying declarations were not present.

It is essential to the admissibility of dying declarations as evidence, that it should be made to appear to the court by preliminary evidence, not only that they were made in articulo mortis but also made UNDER A SENSE OF IMPENDING DEATH, which excluded from the mind of the dying person all hopes or expectation of recovery. Robbins vs. State, 8 O. S., 131; 11 Longs. Notes, 329.

Question 168.

Brown is on trial charged with passing counterfeit money on Christmas Day, 1920. The State offered to prove the following facts in chief:

(a) That Brown had been convicted of assault with intent to commit rape in the year 1916.

(b) That he had pleaded guilty to the charge of administering a poisonous drug to his wife in August, 1920.

(c) That he had been convicted and sentenced to the penitentiary for counterfeiting in 1910.

(d) That he had pleaded guilty and received a suspended sentence for uttering a forged check in 1910.

What if any of these facts were admissible in evidence?

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Answer No. 168.

- (a) No.
- (b) No.
- (c) Yes.
- (d) Yes.

It is an elementary proposition of law, both sound and humane, that a person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed other crimes and offenses. But this rule has many exceptions in certain particular lines of cases as to prior acts:

1. Where a specific intent to defraud is charged, other fraudulent acts may be offered to show fraudulent intent between the same parties, and in some cases as between different parties by the same defendant.

2. Where "scienter" or guilty knowledge is a necessary element of the offense, other criminal acts may be shown of the same or similar nature, as in the sale of adulterated foods.

3. Where the various acts show a general scheme or system of criminal conduct.

4. In what are known as "sexual" crimes, such as a continuous adultery, or fornication, criminal conversation, incest and the like. *State of Ohio vs. Reineke*, 89 O. S., 390 at 891.

# **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

## **EVIDENCE**

**Question 169.**

(a) To what limit must the cross-examination of a witness, in general, be confined?

(b) May a witness refuse to answer, if so, in what instance?

(c) How may the credibility of a witness be impeached?

**Answer No. 169.**

(a) "The cross-examination may go to all the bearings of the examination in chief and to whatever goes to explain or modify it, and to all matters connected with the res gestae, and it is error to limit it." *Martin vs. Elden*, 32 O. S., 282.

The defendant cannot introduce his own distinct defenses or avoidance on cross-examination of the plaintiff's witnesses, though otherwise the cross examination is not confined to matters brought out in chief, but may extend to the entire issue. *Legg vs. Drake*, 1 O. S., 286.

(b) Yes. A witness is not bound to answer any question that will directly or indirectly incriminate him. *Warner vs. Lucas*, 10-0-336.

(c) The credit of a witness may be impeached.

1. By showing on cross-examination his bias or interest or his peculiar relations to the parties or his disparaged character.

2. By disproving his statements, made in court, by the testimony of other witnesses.

3. By proving his general bad character for veracity.

4. By proving statements of the witness, made out of court, inconsistent with or contradicting those made on the witness stand. *Greenleaf*, Sec. 461, 462.

**Question 170.**

Give the distinction between civil and criminal cases in respect to the degree or quantum of evidence necessary to justify a jury in finding their verdict.

**Answer 170.**

"In the ordinary civil case the degree of proof, or quality of persuasion as some textwriters characterize it, is a

mere preponderance of the evidence. Indeed, the Supreme Court of Ohio in *The C., H. & D. Ry. Co. vs. Frye*, 80 O. S., 289, reversed a judgment of the lower court in that the trial judge charged the jury "that unless the party upon whom the burden rested has satisfied your minds by a preponderance of the evidence recovery could not be had," the Supreme Court holding that such instructions imposed a degree of proof greater than a mere preponderance."

"In Criminal cases in all civilized countries the degree of proof is enhanced beyond that of civil cases in the degree that the state has a more jealous concern for the life and liberties of its inhabitants than it can possibly entertain for property rights. The burden of all such prosecutions is to prove every essential element of the crime beyond a reasonable doubt." *Merrick vs. Ditzler*, 91 O. S., at p. 260.

Question 171.

On the trial of a person accused in an indictment for murder, the defendant is defending on the ground of self-defense. For the purpose of showing reasonable ground for apprehension of bodily injury or loss of life, the court allowed evidence to be introduced, over objection, of particular instances of violence or viciousness on the part of the deceased which did not concern the defendant and at which the latter was not present and of which he has no personal knowledge.

Did the court err? Give reasons for your answer.

Answer 171.

"The rule laid down by this court in the case of *The State of Ohio vs. Roderick*, 77 O. S., 301, is conclusive upon the proposition that such evidence is not admissible. In that case the defendant was permitted to prove the conduct of the deceased on other occasions, as indicating his actual character, and then was permitted to show that he had learned of those instances prior to his own affray with the deceased, in order to show that the state of mind under which he, the defendant, acted.

The court there held that such evidence was incompetent and sustained exceptions presented by the state, laying down the rule which should govern in such cases, and we have no inclination to disapprove that decision." *Szalkai vs. The State of Ohio*, 96, O. S., at P. 37.

Question 172.

A father conveyed a farm to his son by deed, reciting a consideration of \$5,000. After the father's death, in mak-

## **BAR EXAMINATIONS**

ing distribution of his estate, the other heirs undertook to show that the \$5,000 was not paid by the son and that the value of the farm was an advancement from father to son.

Was the evidence admissible? Give your reasons.

**Answer 172.**

The evidence was admissible.

"The consideration clause in a deed of conveyance is conclusive for the purpose of giving effect to the operative words of the deed, creating a right or extinguishing a title, but that for every other purpose it is open to explanation by parol proof, and is prima facie evidence only of the amount, kind and receipt of the consideration, and is settled by the almost unbroken current of American decisions, although the contrary is true in England." *Shehy vs. Cunningham*, 81 O. S., at p. 291.

"If any estate, real or personal, has been given by an intestate in his lifetime as an advancement to any child or children of his, or their descendants, it must be considered a part of the estate of the intestate, so far as it regards the division and distribution thereof among his children or their descendants, and be taken by such child or children of their descendants toward his or her share of the estate." *Ohio Gen. Code*, 8585.

"If the value of the estate, real or personal, so advanced, is expressed in the deed of conveyance, or in the charge thereof, made by the intestate, or in the receipt in writing, given by the person receiving the advancement, it must be considered of that value, in the division and distribution of the estate, otherwise, at its estimated value when advanced." *Ohio Gen. Code*, 8588.

**Question 173.**

A sued B on a promissory note for \$1,000, dated on a particular day. B's defense was that the note was given for a gambling consideration and was therefore void. On the trial of the case, the court allowed evidence to be given, over the objection of the plaintiff, to the effect that on the day of the date of the note in suit, the defendant was intoxicated; that whenever the defendant was under the influence or excitement of wine or spirits, he had a propensity to gamble. Did the court err? Why?

**Answer 173.**

The court was in error in admitting the evidence.

"When there is a question whether a person said or did

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something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the evidence on the occasion in question of any intention, knowledge, good or bad faith, malice or other state of mind, or of any state of body or bodily feeling, the evidence of which is in issue, or is deemed to be relevant to the issue, but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Jones on Evidence, p. 142.

### Question 174.

A commenced an action against B on a promissory note for \$1,000 executed and delivered by B to A. B by answer set up a counter claim for damages resulting from the breach of an oral contract which it was alleged had been entered into between the parties, whereby A agreed to employ B as agent for a term of two years to sell cigars. The allegations of the answer were denied by the reply. Upon trial B offered oral testimony to prove the agreement. The testimony was objected to.

How should the court have ruled, and why?

### Answer 174.

The objection should be sustained, and the evidence excluded.

"After a general denial is filed, the defendant may take advantage of the statute of frauds by objecting to the admission of oral evidence to prove the contract." Birchell vs. Neaster, 36 O. S., 331.

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### PLEADINGS

#### Question 175.

In an action for damages based upon a breach by the vendor of a contract for the sale of real estate by its terms free from incumbrances, purchaser does not allege a payment or tender payment but does allege that there is an incumbrance upon the real estate which the vendor is unable to remove. Vendor demurs. Should demurrer be sustained or overruled? Why?

#### Answer 175.

The demurrer should be overruled.

"The petition will not be held bad on demurrer because of the failure of the purchaser to allege a payment or tender of payment of the balance of the purchase price, where there is an allegation in the petition that there is an encumbrance upon the real estate which the vendor is unable to remove." *Gebbie vs. Efros*, 95 O. S., 215.

#### Question 176.

Distinguish between actions at common law *ex contractu* and actions *ex delicto*.

#### Answer 176.

Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded ON CONTRACTS, the latter UPON TORTS or wrongs. Of the former nature are all actions upon debt or promises; of the latter all actions for trespasses, nuisances, assaults, defamatory words and the like. *Blackstone's Comm.*, Vol. III, p. 117.

#### Question 177.

- (a) What is a material allegation?
- (b) How is a civil action commenced?

#### Answer 177.

(a) A material allegation in a pleading is one which could not be stricken out without leaving it insufficient. *Gen. Code*, 11330.

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(b) A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. Gen. Code, 11279.

Question 178.

When may a set-off be pleaded?

Answer 178.

A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract. Gen. Code, 11319.

Question 179.

What allegations does a demurrer admit?

Answer 179.

A demurrer to a pleading admits the truth only of that which is well pleaded. It does not admit the truth of mere conclusions of law, nor of allegations of fact which are repugnant to, or inconsistent with each other. Peterson vs. Roach, 32 O. S., 374.

A demurrer admits the truth of all the facts properly pleaded in the pleading to which the demurrer is filed. Willis vs. Holcomb, 83 O. S., 254.

Question 180.

In an action for an injury alleged to have been caused by the negligence of the defendant, is it necessary to allege in the petition that the injury was caused without the fault or negligence of the plaintiff?

Answer 180.

The plaintiff is not in this state required to allege in his petition that he was without fault, "unless the other averments necessary to constitute a cause of action suggest the inference that he was guilty of contributory negligence." Railway vs. Nolthenius, 40 O. S., 376; IV Longs: Notes, 32.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### PLEADINGS

#### Question 181.

A client comes to you with a promissory note for \$1000.00 past due and unpaid, given to him by a neighbor, who at the same time that he executed the note, also executed and delivered to your client a mortgage on his farm to secure payment of the note. The neighbor's wife joined in this mortgage but did not sign the note. Your client instructs you to bring whatever action may be necessary to secure the amount due him.

- (a) What kind of an action would you bring?
- (b) What relief would you ask?
- (c) What steps would you take to commence the action?
- (d) In what court?

- (a) A civil action (i. e. in equity)
- (b) Personal judgment on the note, foreclosure of the mortgage, and sale of the property to satisfy the judgment.
- (c) A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. Gen. Code, 11279.
- (d) In the Common Pleas Court.

The court of Common Pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of the justices of the peace. Gen. Code, 11215.

#### Question 182.

A client comes to you with a promissory note for \$1000.00 past due and unpaid, given to him by a neighbor, who at the same time that he executed the note, also executed and delivered to your client a mortgage on his farm to secure payment of the note. The neighbor's wife joined in this mortgage but did not sign the note. Your client instructs you to bring whatever action may be necessary to secure the amount due him.

- (a) What pleadings could the attorney for the defendants file to your petition?

## OHIO SUPREME COURT

(b) If he answers, what pleading can you file to his answer?

(c) When is it necessary to plead to an answer?

### Answer 182.

(a) Demurrer to the petition; Answer, or this pleading, if it demands affirmative relief, may be styled a cross petition. Gen. Code, 11303.

(b) Demurer to answer, or Reply.

(c) When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter. Gen. Code, 11326.

### Question 183.

A client comes to you with a promissory note for \$1000.00 past due and unpaid, given to him by a neighbor, who at the same time that he executed the note, also executed and delivered to your client a mortgage on his farm to secure payment of the note. The neighbor's wife joined in this mortgage but did not sign the note. Your client instructs you to bring whatever action may be necessary to secure the amount due him.

(a) If on trial of the case, judgment is rendered against your client, what steps would you take to obtain justice?

(b) What pleadings would you file, and where?

### Answer 183.

(a) Endeavor to obtain a new trial, and if unsuccessful, take the proper steps to have the case reviewed on error. (As this is a chancery case, it could also be appealed.)

(b) A motion for a new trial. If this was overruled, I would file a petition in error, with transcript of the docket and journal entries and a bill of exceptions in the Court of Appeals.

### Question 184.

(a) Is there any difference in form in a petition in an action at law and one in equity?

(b) How is it determined from the pleadings whether an action is at law or in equity?

### Answer 184.

(a) The code has abolished the distinction between

## BAR EXAMINATIONS

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actions at law and suits in equity so far as relates to matters of procedure. *Klonne vs. Bradstreet*, 7 O. S., 322.

(b) Whether an action is equitable or legal, and therefore triable to a jury, is determined by the issues presented and the relief required. *Taylor vs. Brown*, 92 O. S., 293; 110 N. E., 739.

Question 185.

What is the purpose of the provisions of the Ohio Code governing Pleadings?

Answer 185.

The civil code expressly abolishes all fictions in pleadings. *Shourds vs. Allison*, 5 O. N. P., 54.

Under the code, the mere form of action is to be disregarded. *Neilson vs. Fry*, 16 O. S., 552.

A leading object of the code is the avoidance of circuitry and multiplicity of suits. *Morgan vs. Spangler*, 20 O. S., 38.

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**JUNE, 1920**

**PLEADINGS**

**Question 186.**

- (a) What was the name of the first paper filed by the plaintiff in commencing an action at common law.
- (b) What was the purpose of it?
- (c) How is the same purpose accomplished under our code?

**Answer 186.**

- (a) Declaration.
- (b) To advise the opponent of the nature of the claim against him.
- (c) By filing a petition.

**Question 187.**

- (a) What pleadings are allowed by the Ohio Code?
- (b) How should pleadings be construed?

**Answer 187.**

- (a) Petition.  
Demurrer to petition.  
Answer, which if it demands affirmative relief, may be styled a cross petition.  
Demurrer to answer.  
Reply.  
Demurrer to reply. Gen. Code, Sec. 11303.
- (b) The allegations of a pleading shall be liberally construed, with a view to substantial justice between the parties. Gen. Code, 11345.

**Question 188.**

What statement and averments do you regard as essential in drawing a petition on a promissory note? (Ohio Code.)

**Answer 188.**

It shall be sufficient for a party to set forth a copy of the instrument, with all the credits and indorsements thereon, and to state that there is due to him, on such instrument from the defendant, a specified sum which he

## BAR EXAMINATIONS

claims, with interest. When others than the makers of the note are parties, the facts which fix their liability must be stated. Gen. Code, 11334.

Question 189.

(a) If the defendant files a demurrer which is sustained, what may the plaintiff then do?

(b) If the defendant demurs to the petition, but files an answer before the demurrer has been heard, what is the effect on the demurrer?

Answer 189.

(a) If the demurrer is sustained, the adverse party may amend if the defect thus can be remedied, with or without costs as the court may direct. It shall be no objection to such amendment that it changes the action from law to equity, or vice versa, if its basic, essential facts, and final object remain the same. Gen. Code, 11365.

(b) The filing of an answer or of an amended petition waives demurrer previously filed. *Calvin vs. State*, 12 O. S., 60; *Bank vs. Street*, 12 O. S., 1; *Vore vs. Woodford*, 29, O. S., 245.

Question 190.

When, if at all, is it necessary for the plaintiff to file a reply to the defendant's answer? Give reason for answer.

Answer 190.

When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He may also allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter. Gen. Code, 11326.

Where the answer amounts to a denial of the facts set forth in the petition, no reply is necessary.

But where the answer sets forth new matter, which if taken as true would entitle the defendant to judgment on the pleadings, the new matter must be met by reply. This is because the reply is necessary to make up an issue.

Question 191.

(a) X, in his petition, states facts sufficient to entitle him to a judgment for money, but he claims the amount due him as wages on a contract of employment instead of as damages for the breach of it. Does this error affect his recovery? Why?

## OHIO SUPREME COURT

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(b) An employee of a railroad company commenced an action to recover from his employer on account of injuries resulting from the latter's negligence. Plaintiff did not allege that he did not have knowledge of such negligence.

Did this omission prevent a recovery? Why?

Answer 191.

(a) While the demand for relief forms a part of the petition, yet it constitutes no part of the statement of facts constituting the cause of action. *Culver vs. Rogers*, 33 O. S., 546.

The prayer contained in a pleading may be changed at any stage of the cause without terms. *Draper vs. Moore*, 2 C. S. C. R., 167; 13 D. 834.

Therefore this error would not affect a recovery by the plaintiff.

(b) Yes, if it is required to repel an inference of knowledge which would naturally be raised by the facts alleged in the petition.

In an action to recover from a railroad company for personal injuries received by a brakeman in consequence of negligence in the loading of cars, which negligence was the proximate cause of the injury, the plaintiff must aver and prove:

(1) That the loading was negligently done.

(2) That the company had or should have had knowledge thereof.

(3) That the employe did not know of the negligence.

And if these propositions are not established in such a way that the record will show that there is evidence tending to establish them, it is the duty of the court to instruct the jury to return a verdict for the defendant. *Beard vs. Railroad*, 3 O. C. C., N. S., 32; 13 O. C. D., 169. Affirmed no opinion, 65, O. S., 580.

The servant cannot recover for injuries received when the danger is obvious, and can be understood by the servant as well as the master. *Id.* See also *Railway vs. Marker*, 87 O. S., 99.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

### **PLEADINGS**

**Question 192.**

(a) Explain briefly the difference between a general and a special demurrer.

(b) Define "traverse." Name and define two kinds.

(c) Define "departure."

**Answer 192.**

(a) A general demurrer questions the legal sufficiency of the pleading to which it is addressed, in general terms, without assigning any particular ground for its objections; a special demurrer adds to this a specification of particulars containing specific legal objections.

Section 11310 of the General Code provides that demurrer shall specify the grounds of the objection to the petition, unless it does so, it shall be regarded as objecting only that the court has no jurisdiction of the subject of the action, or that the petition does not state facts constituting a cause of action.

(b) Traverse means literally, anything that hinders, thwarts, or obstructs. In pleadings, the denial of matter of fact alleged on the other side, and may be interposed to any pleading of fact.

A general traverse is one that denies all that is alleged in the pleadings to which it is addressed.

A common traverse is a direct contradiction, modo et forma of some particular matter alleged by the opposite party.

A special traverse is an affirmative statement of facts inconsistent with those alleged by the opposite party, followed by a denial of allegations rendered material by said affirmative statement. The affirmative part of a special traverse is called the inducement, and the negative part is called the absque hoc, these being the words by which this technical form of negation was formally introduced.

(c) Departure takes place when a party deserts his former ground of complaint or defense, and resorts to another. Departure is also defined as inconsistency by the same party in successive pleadings.

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### Question 193.

(a) Explain the difference between a supplemental pleading and an amended pleading, giving the purpose of each.

(b) Explain the difference between counter-claim and set-off.

### Answer No. 193.

(a) The purpose of an amended pleading is to set forth in a different form the facts which constitute a cause of action or defense at the time the original pleading was filed.

A supplemental pleading alleges facts material to the case which occurred since the filing of the former pleading. Gen. Code, 11360-11368.

(b) General Code 11317. A counter claim is a cause of action existing in favor of a defendant and against a plaintiff, or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.

General Code 11319. A set-off is a cause of action existing in favor of a defendant against a plaintiff between whom a several judgment might be had in the action, and arising on contract or ascertained by the decision of a court. It can be pleaded only in an action founded on contract.

### Question 194.

In a suit for damages for an injury to an employe, arising out of his operating a machine in road building, the defendant filed an answer denying by general denial the negligence set up in plaintiff's petition, and further answering, averred "that the injury complained of in the plaintiff's petition was caused by the negligence of the plaintiff." If you were representing the plaintiff, what would you do?

### Answer 194.

Demur to the answer.

A general demurrer is proper only when the whole gist of a cause is assailed. A denial of each and every allegation not herein specifically admitted, followed by defenses of new matter inconsistent with a denial of the acts or gist of the cause, is not authorized. *Bakas vs. Castarian*, 14 N. P., N. S., 577.



## BAR EXAMINATIONS

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### Question 195.

- (a) Define actions *ex contractu* and *ex delicto*.
- (b) May they be joined in the same action, and if so, when?

### Answer 195.

(a) Actions *ex contractu* are for the purpose of enforcing rights or to secure compensation for the breach of obligations resulting from agreements which have a binding force in law.

Actions *ex delicto* are for damages for breach of the rights of the plaintiff irrespective of any contractual obligations.

(b) Actions *ex contractu* and *ex delicto* may be joined in the same action where they are the same transaction, or are connected with the subject of the action. Gen. Code, 11306.

### Question 196.

(a) To what pleadings may interrogatories be attached, and what purpose do they serve?

(b) Explain the difference between *trover* and *replevin* in common law.

### Answer 196.

(a) General Code, 11348. A party may annex to his pleadings, other than a demurrer, interrogatories, pertaining to the issue made in the pleadings, which interrogatories if not demurred to shall be plainly and fully answered under oath by the party to whom they are propounded, or if such party is a corporation, by the President, Secretary or other officer thereof, as the party propounding requires.

The purpose of attaching interrogatories is to save the taking of a deposition.

(b) *Trover* in common law was originally an action of trespass on the case for the recovery of damages against one who had found another's goods, and who refused to deliver them at demand to the owner, but converted them to his own use. Later the finding of the property came to be treated as a mere fiction at law, and the action was permitted to be brought against anyone who having possession of the personal property of another, sold or used the same without the consent of the owner, or refused to deliver it when demanded.

*Replevin* at common law was an action for the specific recovery of personal property unlawfully taken and detained from the one rightfully in possession thereof.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1921**

**PLEADINGS**

**Question 197.**

(a) Define pleadings, and what must be contained in a pleading to be good?

(b) What pleadings in a civil action are authorized by the Code of Ohio?

(c) How many actions under Ohio Code? Name them.

**Answer 197.**

(a) Pleadings are the written statements in logical and legal form, of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense.

They are the mutual allegations or statements of the parties to a suit affirming on the one side and denying on the other the matters in dispute. Stephen on Pleading (Tyler's edition, p. 2.)

Every pleading must contain the name of the court and the county in which the action is brought, and the names of the parties, followed by the name of the pleading. Gen. Code, 11304.

The petition must contain:

(1) A statement of facts constituting a cause of action in ordinary and concise language.

(2) A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest be claimed, the time for which interest is to be computed shall be stated. Gen. Code, 11305.

The answer must contain:

(1) A general or specific denial of each material allegation of the petition controverted by the defendant.

(2) A statement in ordinary and concise language of new matter constituting a defense, counterclaim or set-off.

(3) When the defendant seeks affirmative relief therein, a demand for such relief. Gen. Code, 11314.

When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He may also allege, in ordinary and

concise language, new matters, not inconsistent with the petition, constituting an answer to such new matter. Gen. Code, 11326.

(b) The only pleadings in civil actions are:

1. Petition;
2. Demurrer to petition;
3. Answer, which if it demands affirmative relief, may be styled a cross petition;
4. Demurrer to answer.
5. Reply;
6. Demurrer to reply. Gen. Code, 11303.

(c) There shall be but one form of action, to be known as a civil action. This requirement does not affect any substantive right or liability, legal or equitable. Gen. Code, 11238.

Question 198.

(a) How is an action commenced in Ohio?

(b) When is an action actually commenced?

(c) Explain what is a plea by way of confession and avoidance?

Answer 198.

(a) A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon. Gen. Code, 11279.

(b) An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served upon him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made. Gen. Code, 11230.

(c) It is a plea which admits the facts alleged in the declaration, and avoids their legal effect by alleging other facts which show that the plaintiff either never had a right of action, or that his right is barred by some supervenient fact. Phillips on Pleading, Par. 69.

Question 199.

(a) A filed suit as an individual against B on a promissory note.

B answered setting up a defense alleging that A had no interest in the note set out in the petition.

A replied to answer showing by the admission in said reply, that he, as plaintiff, holds said note as trustee, and has no right to said note in his individual capacity.

As attorney representing B, how should you proceed? Why?

(b) To what pleadings may interrogatories be attached?

**Answer 199.**

(a) Demur to the reply, on the ground that the plaintiff has no legal capacity to sue. ( Gen. Code, 11309-3.)

An action must be prosecuted in the name of the real party in interest, except as provided in the next three succeeding sections. Gen. Code, 11241.

Section 11241 of the General Code requires that all actions must be brought in the name of the real party in interest, unless in the excepted cases named in sections 11242, 11243 and 11244; and this applies as well to negotiable paper as to choses in action, unless the indorsee or holder is protected under the rules of commercial law, by which, if he be such indorsee or holder before due, in good faith, and for valuable consideration, he takes the same free from all equities.

Therefore, if such indorsee or holder who is not thus protected, sues to recover thereon, is a good defense for the maker to show that he is not the real party in interest, unless he is authorized to sue under sections 11242, 11243 or 11244. *Osborn vs. McClelland*, 43 O. S., 284.

(b) A party may annex to his pleading, other than a demurrer, interrogatories, pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath, by the party to whom they are propounded, or if such party is a corporation, by the president, secretary or other officer thereof, as the party propounding requires. Gen. Code, 11348.

**Question 200.**

(a) Draw a demurrer to petition complete in form setting out the reason therefor, "that the plaintiff has not legal capacity to sue."

(b) Draw a petition complete in form on a promissory note.

**BAR EXAMINATIONS**

**Answer 200.**

(a) Court of Common Pleas,  
Cuyahoga County, Ohio

John Doe, Plaintiff,  
vs. Demurrer to Petition  
Richard Roe, Defendant.

Comes now the defendant herein, and demurs to the petition of the plaintiff herein filed, for the following reason, to-wit:

That, as shown by the allegations of the said petition, the said plaintiff has no legal capacity to sue in this action.

**WILLIAM SMITH,**  
Attorney for Defendant  
(b) Court of Common Pleas,  
Cuyahoga County, Ohio

John Doe, Plaintiff,  
vs. Petition  
Richard Roe, Defendant.

Plaintiff states that the defendant herein is indebted to him in the sum of One Hundred Dollars, with interest thereon at the rate of six per cent per annum from the first day of January, 1921, on a certain promissory note, of which the following is a true copy;

Cleveland, Ohio, January 1st, 1921

One month after date, for value received, I promise to pay to.....John Doe.....or order, the sum of One Hundred and 00/00.....Dollars, with interest from date at the rate of six per cent per annum.

(Signed) **RICHARD ROE**

Plaintiff states that there are no credits nor indorsements on the said note.

**WHEREFORE**, the plaintiff prays judgment against the defendant herein, in the sum of One Hundred Dollars, with interest thereon at the rate of six per cent per annum from January 1st, 1921, and for his costs herein expended.

.....  
Attorney for Plaintiff

State of Ohio,  
County of Cuyahoga, S. S.:

Comes now John Doe, of lawful age, who being duly sworn, states that he is the plaintiff in the above styled action; that he has read the foregoing petition, and that the facts set forth therein are true as he verily believes.

## OHIO SUPREME COURT

Sworn to before me and subscribed in my presence,  
this 7th day of June, 1921.

(SEAL)

Notary Public, Cuyahoga County, Ohio.  
PRAECIPE: To the Clerk: Issue summons on the foregoing petition returnable according to law. Indorse summons "Action for money only. Amount claimed One Hundred Dollars, with interest and costs."

Attorney for plaintiff

### Question 201.

(a) What is the office of a praecipe?

(b) May a cause of action accruing since the commencement of the action be brought in by amendment to the petition?

If not, how may it be brought in?

(c) A petition was filed in the common please court to recover \$90 and one year's interest at eight per cent on a promissory note.

As attorney for the defendant what would you file and what should be the ruling of the court?

### Answer 201.

(a) A slip of paper upon which the particulars of a writ are written. A written order to the clerk of a court to issue a writ. Bouvier's Law Dictionary.

All writs and orders for provisional remedies, and process of every kind, shall be issued by clerks of the several courts; but before they are issued a praecipe shall be filed with the clerk demanding the same. Gen. Code, 2877.

(b) No.

It may be brought in by supplemental petition.

On such terms as to costs as the court, or a judge thereof, prescribes, either party may be allowed to file a supplemental petition, answer or reply, alleging facts material to the case which occurred since the filing of the former petition, answer or reply. Reasonable notice of the application therefor must be given, when the court or judge so requires. Gen. Code, Sec. 11368.

(c) I would file a demurrer on the ground that the court has no jurisdiction of the subject of the action. This demurrer should be sustained on the authority of Sections 10226 and 11215, of the General Code.

Under the restrictions and limitations provided in this

## BAR EXAMINATIONS

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chapter, justices of the peace shall have exclusive original jurisdiction in civil actions for the recovery of sums not exceeding One Hundred Dollars, and concurrent jurisdiction with the Court of Common Pleas in sums over One Hundred Dollars, and not exceeding Three Hundred Dollars. Gen. Code, 10226.

The Court of Common Pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of the justices of the peace; and appellate jurisdiction from the decision of the county commissioners, justices of the peace, and other inferior courts in the proper county, in all civil cases, subject to the regulations provided by law. Gen. Code, 11215.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### PLEADINGS

Question 202.

- (a) Define what is meant by an "action," "issues;" a "trial."
- (b) Designate the style of pleadings allowable in a civil action under the General Code of Ohio.
- (c) How were pleadings designated under the common law?
- (d) Give the distinction between a "motion" and a "demurrer."

Answer 202.

(a) An action is an ordinary proceeding in a court of justice, involving process, pleadings, and ending in a judgment or decree, by which a party prosecutes another for the redress of a legal wrong, enforcement of a legal right, or the punishment of a public offense. (56 O. S., 407.) Ohio Gen. Code, 11237.

Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.
2. Of fact. Ohio Gen Code, 11377.

A trial is a judicial examination of the issues, whether of law or of fact, in an action or proceeding. Ohio Gen. Code, 11376.

(b) The only pleadings in civil action are:

1. Petition;
2. Demurrer to petition.
3. Answer, which if it demands affirmative relief may be styled a cross petition;
4. Demurrer to answer;
5. Reply;
6. Demurrer to reply. Ohio Gen. Code, 11303.

(c) Declaration, plea, replication, rejoinder, surrejoinder, rebutter and surrebutter. Stephen on Common Law Pleading, p. 82.



## BAR EXAMINATIONS

(d) A motion is an application for an order, addressed to a court or judge, by a party to a suit or proceeding, or one interested therein. Ohio Gen. Code, 11370.

A demurrer, under Ohio practice, is a pleading which raises the question of the legal sufficiency of the previous parties' pleading.

Question 203.

(a) Define the nature of each kind of pleading permitted under the Ohio Code.

(b) Give some of the statutory grounds for demurrer under the Ohio Code.

(c) What allegations are necessary in action for divorce under Ohio Code to confer jurisdiction of subject matter?

Answer 203.

(a) The first pleading shall be the petition by the plaintiff must contain:

1. A statement of facts constituting a cause of action in ordinary and concise language;

2. A demand for the relief to which the plaintiff claims to be entitled. If the recovery of money is demanded, the amount shall be stated; and if interest is claimed, the time for which interest is to be computed shall be stated. Ohio Gen. Code, 11305.

The answer shall contain:

1. A general or specific denial of each material allegation of the petition controverted by the defendant;

2. A statement in ordinary and concise language of new matter constituting a defense, counter-claim or set-off.

3. When a defendant seeks affirmative relief therein, a demand for such relief. Ohio Gen. Code, 11314.

When the answer contains new matter, the plaintiff may reply to it, denying generally or specifically each allegation controverted by him. He also may allege, in ordinary and concise language, new matter, not inconsistent with the petition, constituting an answer to such new matter. Ohio Gen. Code, 11326.

(b) The defendant may demur to the petition only when it appears on its face either:

1. That the court has not jurisdiction of the person of the defendant;

## OHIO SUPREME COURT

2. That the court has no jurisdiction of the subject of the action;

3. That the plaintiff has no legal capacity to sue;

4. That there is another action pending between the same parties for the same cause;

5. That there is a misjoinder of parties plaintiff or defendant;

6. That there is a defect of parties plaintiff or defendant;

7. That several causes of action are improperly joined;

8. That separate causes of action against several defendants are improperly joined;

9. That the action was not brought within the time limited for the commencement of such actions; or

10. That the petition does not state facts which show a cause of action. Ohio Gen. Code, 11309.

(c) Except in an action for alimony alone, the plaintiff must have been a resident of the state at least one year before filing the petition. Actions for divorce or for alimony shall be brought in the county of the which the plaintiff is and has been for at least thirty days immediately preceding the filing of the petition, a bona fide resident or in the county where the cause of action arose. The court shall hear and determine the case, whether the marriage took place, or the cause of divorce occurred, within or without the state. Ohio Gen. Code 11980.

### Question 204.

The General Assembly of Ohio passes an act conferring the right of eminent domain upon manufacturing corporations organized and doing business under laws of the state for profit.

The Clay Pottery Company, an Ohio corporation engaged in the manufacture of sewer tile, was unable to agree with the owner of a clay bank for the purchase of the same and thereupon filed an action in the probate court of..... county, Ohio, for the purpose of appropriating the same and have a jury assess compensation to the owner.

If you were the attorney for the defendant land owner, what steps would you take in the matter, and what pleadings would you file, if any?

Give reasons with answer.

## **BAR EXAMINATIONS**

**Answer 204.**

File demurrer to the petition.

The statute authorizing this corporation to exercise the right of eminent domain is unconstitutional.

"Private property shall ever be held inviolate, but subservient to the public welfare." Ohio Const., Art. II, Sec. 19.

**Question 205.**

Jones sold Brown an automobile for \$1,000. Four hundred dollars to be paid on the day of sale and balance of purchase price to be paid within five days after delivery. Jones, however, to hold title to car until full purchase price was paid. Brown defaulted in making the final payment after delivery of the car and the first payment.

Jones brought an action in replevin and filed a petition and nothing else, alleging, however, in his petition as follows: "Plaintiff says that he is entitled to the immediate possession of said automobile, and seeks possession of the same by virtue of a special ownership therein."

What action would you take in the matter if employed by the defendant? Give reasons for answer.

**Answer 205.**

Demur to the petition because it does not set forth a cause of action in replevin.

When such property except machinery equipment and supplies for railroads and contractors for manufacturing brick, cement and tiling, and for quarrying and mining purposes, is so sold or leased, rented, hired, or delivered, the person who sold, leased, rented, hired, delivered or his assigns or the agent or servant of either or their agent or servant shall not take possession of such property, without tendering or refunding to the purchaser, lessee, renter, or hirer thereof or any party receiving it from the vendor, the money so paid after deducting therefrom a reasonable compensation for the use of such property, which in no case shall exceed fifty per cent of the amount so paid, anything in the contract to the contrary notwithstanding, and whether such condition be expressed in the contract or not, unless such property has been broken, or actually damaged, when a reasonable compensation for such breakage or damage shall be allowed. But the vendor shall not be required to tender or refund any part of the amount so paid unless it

## OHIO SUPREME COURT

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exceeds twenty-five per cent of the contract price of the property. Ohio Gen. Code, 8570.

"An action of replevin cannot be maintained to recover possession of chattels sold under a contract of conditional sale unless the vendor makes a tender as required by this section." *Baum vs. Harrison*, 9 O. N. P., N. S., 257; *Schlitt vs. Fixture Co.*, 22 O. N. P., N. S., 198.

Question 206.

(a) A files a petition that on its face was bad for uncertainty, argumentativeness, informality and pleading evidence. B's attorney filed a demurrer to the petition. State if that was a proper pleading. Give reasons.

(b) How is an "issue" made up in a will contest?

(c) How is an issue made up in a criminal case for a felony?

Answer 206.

(a) It was not a proper pleading.

"Argumentativeness is not a ground of demurrer." 100 Ind., 85.

"A motion to strike out is the proper remedy for uncertainty, argumentativeness and informality in pleading. 14 O. S., 200.

"The remedy in all such cases is by motion, and it is only when the pleading is incurable by amendment that demurrer lies." See 2 Bates, Pl. 962.

(b) An issue must be made up, either by pleadings or an order on the journal, whether or not the writing produced is the last will or codicil of the testator, which shall be tried by a jury. The verdict shall be conclusive, unless a new trial be granted, or the judgment is reversed or vacated. Ohio Gen. Code, 12082.

(c) By the entering of the plea of "not guilty" by the defendant.

"If the accused plead "not guilty," such plea shall be entered on the indictment, and the prosecuting attorney, under the direction of the court, shall designate a day for trial, which shall be of the term at which such plea is made, unless such court, for good reasons, continue the case to a subsequent term." Ohio Gen. Code, 13624.

"The plea of not guilty in a criminal case raises an issue to be tried by the jury and not by the court, and where the defendant has not admitted the claim of the state it is error for the court to recite to the jury the state's evidence." *Morgan vs. State*, 48 O. S., 371.

## **OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

### **PARTNERSHIP**

**Question 207.**

(a) Define dormant partner.

(b) Is a dormant partner liable to creditors along with other partners? If so, when? If not, why?

**Answer 207.**

(a) Sleeping; silent; not known; not acting. One whose name and transactions as a partner are professedly concealed from the world. Bouvier's Law Dictionary.

A dormant partner combines in himself the characters of both the secret and silent partners; that is, his character as a partner is concealed, and he has no voice in the management of the partnership business. Gilmore on Partnership, p. 111.

(b) When the dormant partner is discovered, he is liable as a general partner. Gilmore on Partnership, p. 111-112.

Whenever a partner makes a contract for the firm, and in its name, within the limits of his express or implied authority as a partner, he binds the firm and all the members of it.

A secret or dormant partner is therefore liable, when discovered upon firm contracts, to the same extent as though he had been an ostensible partner. Mechem on Partnership, Sec. 192-193.

**Question 208.**

(a) What is the meaning of the term "good will?"

(b) Is it generally regarded as an asset? Why?

**Answer 208.**

(a) Lord Eldon declared that "the good will of a trade is nothing more than the probability that the old customers will resort to the old place;" and this is approved by Mr. Parsons who says: "It is a hope or expectation, which may be reasonable and strong, and may rest upon a state of things that has grown up through a long period and been promoted by large expenditures of money. Mechem on Partnership, Sec. 87.

(b) The good will is regarded as a valuable incident of the business and may be sold or transferred as such.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### PARTNERSHIP

Question 212.

- (a) Define Ostensible, Nominal, and Silent partners.
- (b) Name four ways in which a partnership may be dissolved.
- (c) In what respect does a partnership differ from a corporation?

Answer 212.

- (a) An ostensible partner is one whose connection with the firm is openly avowed, either by means of the firm sign or otherwise.

A nominal partner is the expression used to designate a person who has acquired the name, with outside persons, of being a partner, without necessarily participating in the profits. Liability attaches to him by reason of his own act or negligence alone. Having courted liability for the firm's debts, he can generally be forced to pay them.

A silent partner, while having his right to a share of the firm's profits, has no voice in the management of the partnership business. This restriction placed upon his power by the mutual agreement of the partners will not, however, be allowed to work to the detriment of a third person, deeming himself, upon good grounds of belief, in dealing with a partner, to be dealing with the firm. Gilmore on Partnership, p. 111.

- (b) Death of a partner.
- (2) Alienation of a partner's share when the partnership is at will.
- (3) Bankruptcy of a partner.
- (4) Events rendering the business unlawful, as the breaking out of war between the countries of which the various parties are residents. Gilmore on Partnership, Par. 199.

(c) A corporation is a legal entity or person created by special authority from the state or sovereign. Though it consists of a number of individuals, it has a legal existence apart from any of them. Hence it may sue or be sued in its corporate name. It may sue its own members and be

owned by them. It may own property and incur liabilities with respect to it. It owns the profits made in any business in which it may engage. The death or retirement of a stockholder, by sale or otherwise, does not in any way affect the identity of the corporation. The liability of the shareholders does not, ordinarily, extend beyond the amount of their subscriptions to the capital stock.

On the other hand, a partnership is created by the agreement of the parties. Though it transacts business as an individual might, it has no legal existence apart from the members composing it. It is not a legal person, and can acquire no rights and incur no liabilities. Hence, it cannot sue or be sued as an entity. Its property is their property. Its rights are their rights, and can be enforced by them. Its liabilities are their liabilities, and can be enforced against them. The death or retirement of a partner destroys the partnership. Each member is individually liable for the whole of the obligations of the partnership, even though he has paid in full his contribution to the partnership capital. Gilmore on Partnership, p. 41.

## Question 213.

A and Son, a partnership, A and his son individually and E and C, their wives as sureties, executed two bonds for \$1,000 and \$1,500 respectively, to a bank in Ohio, each conditioned to secure the credit of said partnership, and said partners individually or either or any of them. Mortgages were executed to secure said suretyship contract and were signed by the parties.

One of the partners died. The partnership at the time of the partner's death owed the bank in excess of \$2500.

(a) What effect did the death of the partner have on the partnership?

(b) Are the sureties liable on the bonds?

## Answer 213.

(a) It dissolved the partnership.

(b) The sureties are liable on both bonds.

Where the written contract appears on its face to be full and complete and to bear the signatures of all the parties to the said contract, the terms and provisions as written in the bond, must control the rights and obligations of the parties thereto, unless said contract be challenged as contrary to public policy, as having been procured by fraud, or as needing reformation in equity because of some mutual mistake.

Here we have a business firm dealing with a business bank to obtain the necessary credit to carry on its business, which presumably furnished a livelihood for said firm and the families represented therein, including of course their wives who became sureties on these bonds.

The very foundations of business make it obligatory that all parties shall fully and faithfully carry out the terms and conditions of each contract according to its spirit and purpose as shown by the four corners of the contract.

The parties took the benefits of these contracts, and they must now assume the burdens." First National Bank vs. Houtzer, 96 O. S., 404.

Question 214.

Upon the dissolution of a trading co-partnership, its assets, including the good will of the business, are sold under an order of court in a case to which members of the partnership are parties.

The purchaser transferred the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, under a corporate name including the name which had been used by the firm.

Action is brought to enjoin the use of the co-partnership name by the corporation. Decide the case.

Answer 214.

The injunction should be refused.

Where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business in the same manner under a corporate name including the name which had been used by the firm. Snyder Manufacturing Co. vs. Snyder et al., 54 O. S., 86.

Question 215.

What is the law of Ohio relating to the commencement of an action by a partnership doing business under a fictitious name?

Answer 215.

Except as otherwise provided in the next following section (relating to foreign partnerships), every partnership transacting business in this state under a fictitious name, or a designation not showing the names of the persons interested as partners therein, must file with the clerk of the Court of Common Pleas of the county in which its principal



## TRUE EXAMINATIONS

office or place of business is situated, a certificate to be indexed by 385m, stating the names in full of all the members of the partnership and their places of residence. Gen. Code, 8099.

Any person doing business as partners contrary to the provisions of the next five preceding sections, shall not commence or maintain an action on or account of any contract made, or transactions had in their partnership name in any court of this state, until they first file the certificate therein required. But if such partners at any time comply with such provisions, then they may commence an action, or if one has been commenced they may maintain it on all such partnership contracts and transactions entered into prior to as well as after such compliance, provided, that if any member of a partnership heretofore existing, had died before such certificate was filed, or any member of a partnership hereafter existing, should die before said certificate is filed, then in such cases the surviving partner or partners, may file such certificate, and such certificate so filed, by the surviving partner or partners, shall have the same force and effect as if the same had been filed by the members of the said partnership, before the death of the said partner. Gen. Code, 8104.

A partnership doing business in a fictitious name may commence an action under G. C. 8104, without alleging compliance with the act requiring registration, but non-compliance with such act may be shown as a defense and will defeat the action unless compliance with G. C. 8099 be made during its progress. Walsh vs. Thomas' Sons, 91 O. S., 210; 110 N. E., 454.

### Question 216.

If A and B should agree to carry on business for their joint profits and to divide the profits equally between them, but B should bear all the losses, and should agree that there be no partnership between them, would they be partners as between themselves? As to third persons?

### Answer 216.

"It would be difficult upon authority to find that the agreement of the parties has not all the requirements of a partnership contract as between the parties themselves. It is even questionable, if, in this case, there might not be, by virtue of this contract, not only the community of profits necessary to entitle each to an account, as provided for in the instrument, but also, by reasonable implication,

a community of property between the parties." *Wood vs. Vallette*, 7 O. S., 172 at 178; II Longs. Notes, 288.

Participation in profits is not necessarily a decisive test of partnership. They must be shared in a joint business in which each has authority to bind the others. The relation and therefore liability rests on agency except in cases of holding out. The rule of *Cox vs. Hickman* has been adopted as the law of Ohio. *Harvey vs. Childs*, 28 O. S., 319; III Longs. Notes, 408.

Sharing net profits necessarily creates a partnership as to third persons. *Wood vs. Vallette*, *supra*.

Question 217.

Will fraudulent representations by one partner, in the course of the partnership business and transactions, bind the firm?

Answer 217.

Fraudulent representations by a member of the firm in the course of the business creates a liability on the firm co-extensive therewith. *Iron Co. vs. Harper*, 41 O. S., 100; IV Longs. Notes, 52.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### PARTNERSHIP

Question 218.

- (a) What is a partnership?
- (b) What is a dormant partner and what must be shown in order to recover against him?
- (c) If a special partner permits his name to be used, what is the effect as to his liability and what position does he thus assume?

Answer 218.

(a) Partnership is a legal relation, based upon the express or implied contract of two or more competent persons, to unite their property, labor or skill in carrying on some lawful business as principals for their joint profit. Mechem on Partnership, Chap. 1, Par. 1.

(b) A dormant partner is one who is both concealed, and passive as to the conduct of the business. Mechem, Par. 16.

A dormant partner is liable, when discovered, upon firm contracts, to the same extent as though he had been an ostensible partner. In order to recover against him, it is necessary to show that he was a partner at the time the obligation was incurred.

(c) If a special partner permits his name to be used, he shall be deemed a general partner. Gen. Code, 8045.

Of course, then he would be liable in solido, the same as any other general partner.

Question 219.

A, B and C were partners under the firm name of "The Columbus Manufacturing Company." The firm as a firm was adjudged bankrupt. X held a promissory note signed by A, by B, and by C, given for borrowed money from X for the use of the firm as was known to all the parties. X sought to prove the note in the bankruptcy of the firm and offered to prove the above facts but the court rejected the evidence and refused to allow the proof. Was this correct?

Answer 219.

The ruling of the court was correct.

Money borrowed by one partner on his individual credit will not become a debt of the firm by being used in its business, and the rule is not altered, even if the money was loaned to one partner to enable him to pay his share of the increased capital. *Bank vs. Sawyer*, 38 O. S., 339.

Question 220.

A was the owner of a business carried on under the name of A & B. The property of the apparent firm was attached on July 1st by a creditor of A, on July 3rd by a creditor of B, and on July 5th by a creditor who had done business with the apparent firm of A & B. The property was insufficient to pay all these claims. In what order must it be distributed?

Answer 220.

The creditor who had done business with the apparent firm of A & B, is entitled to priority in the firm assets.

The creditors of A and the creditors of B, will then share equally in the firm assets, providing that they have first resorted to the individual assets of A and B, respectively, for the payment of their claims.

Partnership property must first be resorted to and exhausted for the payment of the partnership debts, before it can be used for the payment of individual debts. Individual property must first be exhausted for the payment of individual debts before partnership property can be subjected to their payment. This rule does not apply when there are no joint assets for distribution, and no living solvent partner. *Rogers vs. Mernanda*, 7 O. S., 179.

Question 221.

A firm of contractors made a contract to build a house. After the house had been partially completed, one of the partners died. The owner who had paid a pro rata share of the contract price thought he could finish the house himself for less than the residue of the contract price and offered to release the firm from further performance. The surviving partner believing that a profit could be made by finishing the house, refused to accept the release and completed the house, buying in the firm name from the plaintiff material used in the building. The result was a loss. Is the estate of the deceased partner liable to the plaintiff for said material?

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### Answer 221.

The estate of the deceased partner is liable.

After dissolution, the power of each partner is thenceforward limited to closing up the partnership affairs, but for this purpose his authority is deemed to continue, with all the rights and incidents as before. Thus either party may, after dissolution, do any other act respecting the closing up of previous transactions which he might do if the partnership still continued. Mechem on Partnership, Par. 271.

Gen. Code 8090 provides that the surviving partner shall give bond to the Probate Court for the performance of all contracts for which the partnership is liable.

### Question 222.

A firm composed of A & B was dissolved, and notice given to all prior dealers by circular and due advertisement to all others. After the dissolution A, without the knowledge or consent of B, executed a new note in the firm name in renewal of a firm note given to X before the dissolution. At the request of A and upon the promise that the firm would indemnify him, G also signed the note and was compelled to pay it. G knew of the existence of the firm but had never dealt with it and had no knowledge of its dissolution.

Has G any remedy against B.

### Answer 222.

G has no remedy against B.

A partner has no right after dissolution to renew firm notes. *Wilson vs. Forder*, 20 O. S., 89; 11 Longs. 982.

After dissolution a partner, though authorized to close up the concern, has no power to give a new note, or to renew an old one or extend time on the obligations of the firm with persons knowing the dissolution; accordingly, if a liquidating partner takes up a note of the firm by giving the creditor a new one with surety, the surety has to pay it. The other party is not obliged to pay the surety. *Palmer vs. Dodge*, 4 O. S., 21; 11 Longs. 69.

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### PARTNERSHIP

Question 223.

- (a) What is a partnership?
- (b) How do you create a partnership?
- (c) Give the distinction between a partnership and a corporation.

Answer 223.

(a) A partnership is a relation existing, by virtue of a contract expressed or implied, between persons carrying on a business owned in common, with a view of profits to be shared by them. Gilmore on Partnership, Sec. 1.

(b) A true partnership results only from the intention and agreement of the parties who form the relation.

(c) A corporation is a legal entity or person created by special authority from the state or the sovereign. Though it consists of a number of individuals, it has a legal existence apart from any of them. Hence it may sue or be sued in its corporate name. It may sue its own members and be sued by them. It may own property and incur liabilities with respect to it. It owns the profits made in any business in which it may engage. The death or retirement of a stockholder, by sale or otherwise, does not in any way affect the identity of the corporation. The liability of the shareholders does not, ordinarily, extend beyond the amount of their subscriptions to the capital stock.

On the other hand, a partnership is created by the agreement of the parties. Though it transacts business as an individual might, it has no legal existence apart from the members composing it. It is not a legal person, and can acquire no rights and incur no liabilities. Hence it cannot sue or be sued as an entity. Its property is their property. Its rights are their rights, and can be enforced by them. Its liabilities are their liabilities, and can be enforced against them. The death or retirement of a member destroys the partnership. Each member is individually liable for the whole of the obligations of the partnership, even though he has paid in full his contribution to the partnership capital.

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### Question 224.

A and B were partners. A, without the consent and knowledge of B, took out of the partnership funds from time to time large sums of money in excess of amounts drawn out by B. Upon discovering this fact, B demanded that A return the excess amount but A refused to comply with his request. What remedy has B against A, and, if any, what procedure should he follow in the matter?

### Answer 224.

If A and B were equal partners in the business, B has either a right to draw from the partnership funds amount necessary to equalize the amount drawn by A; or B has a right to have A return to the partnership fund the amount drawn in excess to what B has drawn. B should file a suit in equity for an accounting.

### Question 225.

(a) A and B are partners. A went out and collected firm accounts and appropriated such sums to his own use. What crime, if any, did A commit, and what remedy, if any, has B against A?

(b) A and B are partners. B went into the business house one night after the store was closed, and took out from the stock two suits and one overcoat without letting anyone know about it, and he sold said suits and overcoat and appropriated the money to his own use, and made no accounting of the same, but on discovery he acknowledged he committed said act. What crime, if any, did he commit, and what remedy at law, if any, has A against B?

(c) Upon the death of one partner, what right has the surviving partner under the laws of Ohio to acquire the business?

(d) To what extent is one partner liable for the debts of the partnership?

### Answer 225.

(a) A committed no crime as a partner could not be guilty of embezzlement of the partnership assets. B has a remedy against A in that he may file suit against A for an accounting.

(b) B committed no crime. A has no remedy against B at law. He has however, a right to an accounting in equity.

(c) With the consent of the executor or administrator of the deceased partner, and the approval of the Probate Court by which such executor or administrator was ap-

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pointed, the surviving partner or partners may take the interest of such deceased partner in the partnership assets, at the appraised value thereof, first deducting therefrom the debts and liabilities of the partnership, upon giving to the executor or administrator his or their promissory note or notes, with good and approved security, for the payment of the interest of the deceased partner in the partnership assets. Such note or notes shall be payable with interest, in not to exceed nine months from the time the surviving partner or partners elect to take such assets, which election must be made within thirty days from the date of filing the inventory and appraisement, or a certified copy thereof, in such court. Ohio Gen. Code, 8089.

(d) Each partner is liable in solido for the debts of the partnership.

### Question 226.

Brown was engaged in business, using the name of Brown and Company. A lent Brown \$10,000 to be used in his business, taking the notes of Brown for said sum. A, however, was to receive one-fourth of the net profits and eight per cent interest, in any event if the share of the profits was less than that, and A was also to endorse for Brown up to \$10,000 and to have a salary for his services. State whether or not this arrangement constituted a partnership. If not, was A in any way liable to the creditors of Brown and Company?

### Answer 226.

This arrangement did not constitute a partnership as between the parties, because the mere sharing of profits or losses is not the test of partnership in Ohio.

A might be liable to the creditors of Brown & Company, if they were able to show that they extended credit on the fact that A was apparently a partner.

### Question 227.

How are partnerships ended?

### Answer 227.

1. Death of a partner.
2. Alienation of partner's share when the partnership is at will.
3. Bankruptcy of a partner.
4. At common law marriage of a feme sole partner.
5. Events rendering the business unlawful, as the



breaking out of war between the countries of which the various partners are residents.

6. Bankruptcy of the firm.
7. Insanity or other incompetency of a partner.
8. Misconduct of a partner.
9. Impossibility of making a profit.
10. Alienation of a partner's share in a partnership for a definite term.

Question 228.

Define:

- (a) The different classes of partnerships.
- (b) The different kinds of partners.

Answer 228.

(a) In Ohio there are three kinds of partnerships authorized by law. The ordinary partnership which may be formed for any lawful purpose, and in which the members are liable in solido. Limited partnerships may be formed for the transaction of mercantile, mechanical, manufacturing or mining business, but not for the purpose of conducting the business of banking or insurance. These partnerships are formed by two or more persons, at least one of whom shall be known as a general partner, and who is liable in solido for all the debts. Other partners are called special partners and they are not liable for any amount further than the amount of capital which they have agreed to contribute to the business. See Gen. Code, 8036, et seq.

Limited partnership associations are authorized by G. C. 8059, et seq.

Any number of persons not less than three nor more than twenty-five can form one of these associations for the purpose of conducting any lawful business, except the business of real estate or banking. The name of the association must be followed by the word "Limited," and such an association cannot have an authorized existence of more than twenty years.

(b) A general partner, who is liable for the firm's debts in solido.

A special partner is one whose liability for the firm debts is limited to a defined amount. They exist only in the case of a limited partnership, or a limited partnership association.

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An ostensible partner is one whose connection with the firm is openly avowed.

A secret partner is one whose connection with the firm is concealed, or at least is not announced or made known to the public, but who has a voice in the management.

A silent partner is one who shares in the profits as a partner but who has no voice in the management of the partnership business, while his connection with the firm is not concealed.

A dormant partner combines in himself the characters of both the secret and the silent partners. When he is discovered he is liable as a general partner.

The term "Nominal Partner" is the expression used to describe a person who not being in fact a partner, has held himself out or permitted his name to be placed before the public as such. He is liable as a partner to persons who have given credit on the strength of his name.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### PARTNERSHIP

#### Question 229.

What is the general rule as to a partner requiring an accounting or contribution from another member where the partnership is illegal or engaged in illegal business?

#### Answer 229.

Accounting and Contribution are equitable remedies, and will not be allowed between partners where the partnership is illegal or engaged in illegal business, because he who comes into equity, must come with clean hands.

When one of several confederates to a fraudulent transaction has acquired the results of the fraud, equity will not aid the others in obtaining their share of the spoils. Bispham on Equity, Par. 42.

#### Question 230.

What power, if any, has a member of a dissolved partnership firm to bind other members by a note given in payment of a firm debt?

Give reason for answer.

#### Answer 230.

The dissolution of a partnership works an absolute revocation of all implied authority in either of the partners to bind the other to new engagements, contracts or promises, made to or with persons having notice of the dissolution, although springing out of or founded upon, the indebtedness of the firm. *Palmer vs. Dodge*, 4 O. S., 21.

A partnership consisting of three members gave a note in payment of an account for materials furnished in the construction of a building. Subsequently one of the partners retired and one of the remaining partners signed the partnership name to a renewal note which was accepted by the original creditor. Held: The retiring partner was liable on the renewal note, as the remaining partner had authority to sign the partnership name and the original creditor was without notice of the dissolution of the partnership. *Middletown Lumber Co. vs. Martin et al*, 10 Ohio, App. 188.

Question 231.

A partnership intrusts money to a member of the firm to be used in the partnership business, and such member without fraudulent intent, and without the knowledge and consent of his co-partners, formed a new partnership with another person to engage in like business and paid over this money to the new firm, whereby it was lost.

Is the member so doing liable to the old firm?

Give reason for answer.

Answer 231.

A partner entrusted by his firm with money to invest in a commodity for the firm cannot create a new partnership, and if he forms a new firm in the name of his partnership with a third person and entrusts the money to him to make the investment and such person absconds with it, he is liable to his co-partners as for a conversion to his own use. *Reis vs. Hellman*, 25 O. S., 180; 111 Longs. Notes, 217.

Question 232.

A co-partnership consisting of father and son carried on business under the firm name of H. S. & Company. H. S., the father, who was a man of means and gave the firm its credit, sold his interest in the firm to his partner and another son, who, by agreement with the father, continued the business as theretofore in the firm name of H. S. & Company.

Publication had been made of the dissolution of the old and the formation of a new firm, of which a creditor had no notice.

In an action by a creditor who had trusted the new firm on the faith that the father was a member, can the father be held?

Answer 232.

The father, by allowing his name to be so used, held himself out as a member of the new firm, and was thereby estopped from denying the fact, although publication had been made of the dissolution of the old and the formation of the new firm, of which the creditor had in fact, no notice. *Speer vs. Bishop, et al.*, 24 O. S., 598.

Question 233.

The members of a partnership agreed to admit A into the firm on the condition that a company should be incor-

## BAR EXAMINATIONS

porated and, until so incorporated, no change in the name or character of the firm should be made and that A should pay to the firm a certain amount of money.

The stipulated amounts were paid, but the company was not organized.

Was A a partner? Why?

Answer 233.

A was not a partner.

The rule of Cox vs. Hickman was adopted in Ohio. Participation in profits is not necessarily a decisive test of partnership. They must be shared as principals in a joint business in which each has authority to bind the others. The relation and therefore liability RESTS ON AGENCY except in cases of holding out. Harvey vs. Childs, 28 O. 8., 319; Ill Longs. Notes, 496.

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### PARTNERSHIP

#### Question 234.

(a) Fifty farmers contributed in equal amounts to a fund to erect a telephone plant for their exclusive mutual use, and agreed to contribute in equal amounts toward its maintenance and operation.

Is this a partnership?

(b) Give reason for your answer.

(c) Can two corporations form a partnership?

(d) Give reason for your answer.

#### Answer 234.

(a) This is not a partnership.

(b) The rule of *Cox vs. Hickman* was adopted in Ohio. Participation in profits is not necessarily a decisive test of partnership. They must be shared as principals in a joint business in which each has authority to bind the others. The relation and therefore liability rests on AGENCY except in cases of holding out. *Harvey vs. Childs*, 28 O. 8., 319; III Longs Notes, 408.

(c) No.

(d) In a corporation the management is vested by law in either the board of directors or the board of trustees, depending upon whether the corporation is for profit or not for profit. Inasmuch as in a partnership each partner is a general agent for the partnership, to permit a corporation to become a member of a partnership would necessarily make each of the other partners a general agent for the corporation which would oust the board of directors or the board of trustees from their functions of managership.

Further, the corporation being an artificial being, and a separate entity with a continuously changing body of share holders, the doctrine of *delectus personarum* could not be applied to such an organization as a member of a partnership.

#### Question 235.

Name five methods by which partnerships may be dissolved by operation of law.

#### Answer 235.

(1) The death of a partner. (2) Alienation of a partner's share when the partnership is at will. (3) Bankruptcy of a partner. (4) At common law, marriage of a

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feme sole partner. (5) Events rendering the business unlawful, as the breaking out of war between the countries of which the various partners are residents. (6) Bankruptcy of the firm. Dissolution on account of the first four causes may be stipulated against in the articles of partnership. Gilmore, Sec. 199.

Question 236.

(a) What is the difference between a general and a limited partnership?

(b) How is a limited partnership formed in Ohio?

Answer 236.

(a) Partnership is a relation existing, by virtue of a contract, express or implied, between persons carrying on a business owned in common, with a view of profit to be shared by them. Gilmore, Sec. 1.

A Limited Partnership is composed of one or more general partners, who are governed by the usual rules with respect to power, duties and liabilities, and one or more special partners, who have placed a certain sum in the business, and may lose that, but are not liable further. Gilmore, Sec. 33, 204.

(b) Limited partnerships, for the transaction of mercantile, mechanical, manufacturing, or mining business within this state, may be formed by two or more persons, upon the terms, and subject to the conditions and liabilities prescribed in this chapter; but nothing herein shall authorize such partnerships for the purpose of banking or insurance. Ohio Gen. Code, 8036.

Such partnerships may consist of one or more persons, who shall be called general partners, and be jointly and severally responsible as general partners are by law, and also of one or more persons who shall contribute, in actual cash payments, a specific sum, as capital, to the common stock, who shall be called special partners, and not be liable for the partnership debts, except in the cases hereinafter mentioned. The capital invested by a special partner shall be held liable for all the debts of such firm. Ohio Gen. Code, 8037.

The persons forming such partnership shall make and severally sign a certificate, which must contain: (1) The name or firm under which the partnership is to be conducted; (2) The names and respective places of residence of all the partners, distinguishing who are general and who are special partners; (3) The amount of capital which each special partner has contributed to the common stock; (4)

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The general nature of the business to be transacted; and (5) when the partnership is to commence, and when it is to terminate. Ohio Gen. Code, 8038.

### Question 237.

(a) A and B are partners in the business of selling shoes on premises which they purchased with partnership funds, taking the title in the firm name. B without the knowledge of A executes a deed for these premises to C, signing the firm name. What title, if any, does C obtain?

(b) Give reason for answer.

### Answer 237.

(a) No title.

(b) A partnership cannot execute a valid deed in the name of the partnership, whereby partnership lands are conveyed. *Stambaugh vs. Smith*, 23 O. S., 584; 111 Longs. Notes, 147.

### Question 238.

(a) When can one partner maintain an action at law against another partner on a cause arising out of the partnership affairs?

(b) When one of two partners dies, what disposition, if any, shall be made of the good will of the firm?

### Answer 238.

(a) If there has been an account, and a balance thus ascertained, any partner may sue at law. *Goodin vs. Armstrong*, 19 O. S., 44; *Neil vs. Grunleaf*, 26 O. S., 567.

When the claim upon which the action is founded is due from one to the other as individuals, such as claims not connected with the partnership, and claims for agreed final balances which have been converted from partnership into individual claims by the final settlement of the partnership affairs, and when the action is founded upon an express contract between the parties by which the defendant bound himself personally to the plaintiff. *Gilmore*, Sec. 157.

(b) It should be administered as an asset of the partnership.

"The good will does not survive as of right to the surviving partner, and the appraisement under General Code, 8085, et seq, to enable him to take, should take the good will into account, though it be not a distinct asset, and if it was not considered and is appropriated by the surviving partner he may be compelled to account for its value to the deceased partner's estate." *Rammelsberg vs. Mitchell*, 29 O. S., 22; 111 Longs. Notes, 436.



## OHIO STATE BAR EXAMINATION

JUNE, 1919

### BAILMENTS

#### Question 239.

A owed B \$200 on a book account; needing \$100 cash, he borrowed that amount from B on a note; depositing with his watch to secure payment of the note. When the note became due, A paid it and demanded his watch, which B refused to deliver, stating that he intended to hold it to secure the amount due him on the book account. Can A recover the watch from B without paying him the \$200 due on the book account? Why?

#### Answer 239.

He can.

The pledgee has a special property in the pledge goods, involving the right to possession of them, and this he can protect by appropriate action. This right CONTINUES UNTIL the payment of the debt or the performance of the undertaking secured by the pledge. Dobie on Bailments, Sec. 79.

The pawnee cannot retain the pledge for any other debt than the one for which the goods were pledged, unless circumstances appear which show that such was the agreement of the parties. Swan's Treatise, p. 438.

#### Question 240.

A hired B's automobile to drive from Cleveland to Columbus and back. After reaching Columbus, A, without notifying B, drove the automobile to Cincinnati, where it was, without any fault on the part of A, ruined by a flood. Is A responsible for the loss? Why?

#### Answer 240.

A is responsible because he was a tortious bailee.

A bailee is liable in an action of tort for an injury to the property bailed occurring during a use of it by him, or by others with his consent, which was neither expressly nor impliedly authorized by the contract of bailment, even though the injury was the result of accident, and not of negligence. Dobie on Bailments, p. 40.

Question 241.

A delivered his automobile to B, a painter, to have the same painted. Before the work was completed the automobile was destroyed by the burning of the building in which B's shop was located. Is B responsible for the loss? Why?

Answer 241.

B is not liable for the loss of the automobile.

This was a bailment for the benefit of both parties and the bailee would not be liable unless it was shown that he was guilty of negligence in that he did not exercise ordinary care. This lack of ordinary care is not shown in the state of facts given. See Dobie on Bailments, p. 160.

Question 242.

Define:

- (a) Bill of lading.
- (b) Consignor.
- (c) Consignee.
- (d) Common Carrier.

Answer 242.

(a) A bill of lading issued by a carrier is at the same time both a receipt for the goods delivered to the carrier and also a contract containing the terms of the agreement for the transportation of the goods. Dobie on Bailments, p. 196.

(b) A consignor is one who makes a consignment. Bouvier's Law Dictionary.

(c) A consignee is one to whom a consignment is made.

A consignment is the goods or property sent by means of a common carrier by one or more persons, called the consignors, in one place, to one or more persons, called the consignee, who are in another. Bouvier's Law Dictionary.

(d) The common carrier of goods is one who holds himself out in the exercise of a public calling to carry goods, for hire, for whomsoever may employ him. Dobie on Bailments, p. 300, Sec. 107.

Question 243.

(a) What is the general rule as to the liability of an innkeeper for the goods and baggage of his guest?

(b) What is the statutory provision in Ohio upon this subject?

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### Answer 243.

(a) At common law, by the weight of authority, the inn-keeper is liable as an insurer of the guest's goods brought within the inn, unless the loss or damage was due to the act of God, public enemy or fault of the guest.

(b) An innkeeper, whether a person, partnership or corporation, having in his inn a metal safe or vault in good order, suitable for the custody of money, bank-notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers, and bullion, and keeping on the doors of the sleeping rooms used by his guests suitable locks or bolts, and on the transoms and windows of such rooms suitable fastenings, and keeping a copy of this section printed in distinct type conspicuously suspended in the office, ladies' parlor or sitting room, bar room, wash room, and five other conspicuous places in such inn, or not less than ten conspicuous places all therein shall not be liable for loss or injury suffered by a guest, unless such guest has offered to deliver such property to such innkeeper for custody in such metal safe or vault, and the innkeeper has omitted or refused to take and deposit it in the safe or vault for custody and give the guest a receipt therefor. Gen. Code, 5981.

For limitations on liability see two following sections.

The innkeeper's common law liability applies to articles not mentioned in G. C. 5981. Fuller vs. Coates, 18 O. S. 343.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

**BAILMENTS**

**Question 244.**

(a) Give an example of a bailment for the bailor's sole benefit.

(b) By what legal term is it known?

(c) Give an example of a bailment for the bailee's sole benefit.

(d) By what legal term is it known?

**Answer 244.**

(a) Where there is a delivery of goods to be kept for the bailor without recompense.

(b) Depositum.

(c) Where there is a gratuitous loan of goods to be temporarily used by the bailee and then returned.

(d) Commodatum. Hale on Bailments, p. 35-36.

**Question 245.**

(a) What is a pledge?

(b) How, if at all, does a pledge differ from a chattel mortgage?

(c) Would the rights of a pledgee as to property pledged be affected by an adjudication of bankruptcy against the pledgor? Give reason for your answer.

**Answer 245.**

(a) A pledge, pignus or pawn is a delivery of goods to secure the payment of a debt or the performance of an engagement, accompanied by a power of sale in case of a default. Hale on Bailments, p. 36.

(b) In a pledge, possession passes, but title does not; while in a chattel mortgage, title passes, but possession need not. In a pledge, the property may be sold on the non-payment of the debt and only so much of the proceeds as will pay the debt passes to the pledgee. In a mortgage, at common law, the property passes wholly to the mortgagee on the non-payment of the debt. Hale on Bailments, p. 101-108.

## **BAR EXAMINATIONS**

(c) The pledge creates in the pledgee not only a special property in the pledged goods, but a right to sell and reimburse himself to the extent of the debt, which is known in agency as a "power coupled with an interest." This is not affected by the death of the parties. On the pledgor's death, the power can be exercised by the pledgee against his personal representative; on the pledgee's death, the power is exercisable by his personal representative. In like manner, neither marriage, insanity NOR BANKRUPTCY of the parties will terminate the pledge. The lien or right of sale continues either for or against the representative of the pledgor or pledgee whose legal status is changed, such as his committee in insanity or his trustee in bankruptcy. Dobie on Bailments, p. 240, Par. 2.

The reason that the rights of the pledgee are not affected is that the pledgee has a "power coupled with an interest."

Question 246.

A engaged storage for his automobile in B's garage and also engaged B to make certain repairs on said automobile. After the repairs were completed, and for which B charged \$100 the garage was destroyed by fire and A's car was burned.

- (a) Is B liable for the loss of the automobile? Why?
- (b) Is A liable for the repairs on the automobile? Why?

Answer 246.

- (a) B is not liable for the loss of the automobile.

This was a bailment for the benefit of both parties and the bailee would not be liable unless it was shown that he was guilty of negligence in that he did not exercise ordinary care. This lack of care is not shown in the state of facts given. See Dobie on Bailments, p. 160.

- (b) A is liable for the repairs made on the automobile.

As soon as the repairs were completed, the value thereof became a debt due B from A, which debt is not extinguished by the destruction of the machine. See Dobie on Bailments, p. 136.

Question 247.

While A was a guest at a hotel he found a diamond pin on the hotel floor. He handed it to B, the proprietor, and told him to deliver it to the owner if he should call for it. B wore the pin to the races and lost it. X then found the pin and refused to give it to A or to B. The rightful owner never claimed the pin. Who is entitled to its possession? Why?

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### Answer 247.

A is entitled to the pin.

When the owner does not reclaim the goods, they belong to the finder. 1 Blackstone's Comm., 296; Id., Vol. 2, p. 9.

Money or property found on the premises of another has been held in the case of a servant in a hotel, as against the proprietor to belong to the finder. Hamaker vs. Blanchard, 90 Pa., 377; 35 Am. Rep. 664.

Drift logs may be pursued and taken by a former finder, from whom they have escaped. 36 Am. L. Reg., N. S., 588; Ferguson vs. Ray, 44 Or., 557; 77 Pac., 600; 1 L. R. A., N. S., 477.

### Question 248.

A railroad company neglected for five days to ship goods consigned to a firm in Columbus, Ohio. After the goods were shipped there was an unprecedented flood and the goods were destroyed before they reached their destination.

What must the consignor show in order to hold the common carrier liable for damages?

### Answer 248.

The consignor must show some act of negligence, other than mere delay in transportation.

"The Federal Courts have adopted this principle. Where there appears to be no act of negligence upon the part of the carrier other than mere delay in transportation, it has been uniformly held by the Federal Court that such extraordinary and unprecedented events as disclosed by this record become the proximate and the delay the remote cause of the injury." T. & O. C. Ry. vs. Kibler, 97 O. S., 262.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

**BAILMENTS**

**Question 249.**

(a) Generally speaking, when do the responsibilities of a common carrier of goods commence?

(b) When does the responsibility of a common carrier of goods end?

**Answer 249.**

(a) When the goods have been delivered to it or to its proper agent for the purpose of immediate transportation, and are accepted by it. Acceptance may be presumed when the goods are left in the usual place in accordance with the custom or contract of the carriers to so receive them.

Where goods were delivered at the carrier's platform in the customary place, with instructions not to ship them until the owner had crated one of the articles during the day, and the goods were stolen during the day, the liability of the carrier was said to be that of warehouseman. 17 O. C. C. 491.

(b) When the goods have arrived at their destination, notice has been sent to the consignee, and a reasonable time has elapsed within which time the consignee should have called for the goods.

**Question 250.**

Distinguish between a bailment and a mortgage of personal property.

**Answer 250.**

When possession of personal property passes as security for a loan, this form of bailment is called a pledge.

In a pledge, possession passes, but title does not; while in a mortgage, title passes, but possession need not.

In a pledge, the property may be sold on the non-payment of the debt, and only so much of the proceeds as will pay the debt passes to the pledgee.

In a mortgage, at common law, the property passes wholly to the mortgagee on the nonpayment of the debt.

## OHIO SUPREME COURT

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### Question 251.

(a) State the difference between a common carrier of goods and a common carrier of passengers as to his liabilities.

(b) To what extent may a common carrier limit its common law liability by contract?

### Answer 251.

(a) At common law, the common carrier is held to be an insurer of GOODS shipped, except those occasioned by—

- (1) The act of God.
- (2) The public enemy.
- (3) The fault of the shipper.
- (4) The inherent vice of the thing shipped.
- (5) By the public authority.

Even where the loss is occasioned by one of the above named perils, the carrier is liable if such loss could have been avoided by the exercise of ordinary care and diligence. Hale, p. 351; Schouler, Par. 405.

The common carrier is bound to exercise the highest degree of care possible in the circumstances, for the safety of its PASSENGERS:

(b) The common carrier can limit its liability to any extent, but it is not permitted to place any limitation upon its liability for the result of its negligence, or that of its servants or agents, or as a result of having defective vehicles. See *Railroad vs. Hubbard*, 72 O. S., 315; *Railroad vs. Mary Kinney*, 95 O. S., 64.

### Question 252.

Who is the proper party to maintain an action against a common carrier for goods lost in transit, the consignor or consignee?

### Answer 252.

Under the Code of Ohio, the action must be brought by the real party in interest. Therefore the answer to this question would depend upon who had title during the shipment.

The action should ordinarily be brought by the consignee, but in those cases where the title is in the consignor during the transit it should be brought by him.

### Question 253.

(a) A guest of a hotel, having remained for one week, paid his bill and departed, announcing that he would call



## TEAR EXAMINATIONS

for his baggage some time the next day on his return from a trip into the country, to which the landlord consented. What relation exists between the guest and the landlord, and under what circumstances is the landlord liable for the loss of the baggage?

(b) Can a common carrier hold goods for a general balance due on freight charges for other goods shipped over its lines? If so, why? If not, why?

Answer 253.

(a) The innkeeper's exceptional liability for the baggage of his guest does not cease immediately on the latter's leaving the inn, but this continues until the guest has had a reasonable time to effect a removal of the baggage. Here, a reasonable time is usually a short time, for the guest must act with suitable dispatch. Dobie on Bailments, Par. 104.

The guest has not, in this case, brought himself within the rule, and therefore the innkeeper becomes a gratuitous bailee, and laible only as such. See also *Hotels Statler vs. Safier* (Cuy. C. of A.)

(b) The carrier cannot hold the goods for a general balance due on freight charges for other goods.

The carrier's lien is a special lien, and not a general lien, in the absence of an express contract, long continued usage, or statute to that effect. The carrier cannot hold the goods to enforce the payment of a general balance arising out of a series of similar shipments. Dobie on Bailments, Par. 149.

Question 254.

(a) If a person received goods upon an understanding that he may purchase upon certain conditions, as, if the goods shall be satisfactory, is it a sale or a bailment?

(b) Goods were shipped by railroad to Smith. Smith and others were engaged in a strike, and the goods consisted of arms and ammunition. The railroad, fearing trouble if the goods were delivered purposely shipped them to another point, kept them there until the danger was past, then offered to deliver them to Smith. Smith refused to accept them claiming a conversion by the railroad. Was it a conversion?

Answer 254.

(a) The transaction is a bailment, until the title passes under the rules of the Sales code.

When goods are delivered to the buyer on approval, or

## OHIO SUPREME COURT

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on trial, or on satisfaction, or other similar terms, the property therein passes to the buyer

—when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.

—if he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time; and if no time has been fixed, upon the expiration of a reasonable time. What is a reasonable time is a question of fact. Gen. Code, 8399-3.

(b) Yes, this was a conversion.

A common carrier who, having received goods to be carried to a designated place, transports them to another place, to prevent their coming to the possession of the consignee, and deprive him of their use and disposition, is liable for conversion of the goods.

The motive by which a party was controlled in the conversion of property, is of no avail as a defense, though it may be shown where exemplary damages are claimed. *Railroad vs. O'Donnell*, 49 O. S., 489.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1920

### BAILMENTS

#### Question 255.

(a) What is a bailment? (b) How does a bailment differ from a pledge? (c) How does a bailment differ from a mutuum? (d) For what degree of care is a gratuitous bailee liable?

#### Answer 255.

(a) A bailment is the transfer of the possession of personal property, without a transfer of ownership, for the accomplishment of a fixed purpose, whereupon the property is to be re-delivered, or delivered over to a third person.

(b) A bailment can hardly be said to differ from a pledge inasmuch as a pledge is a species of bailment. A pledge is the delivery of personal property to secure the payment of a debt or the performance of an engagement, accompanied by a power of sale in case of default.

(c) A mutuum is a delivery of goods, not to be returned in specie, but to be replaced by other goods of the same kind. At common law such a transaction is regarded as a sale or exchange, and not as a bailment, as the particular goods are not to be returned.

(d) The law requires only a slight diligence on the part of the bailee, and makes him answerable only for gross neglect.

#### Question 256.

Adams, an automobile dealer, sold an automobile to Brown, partly on credit. Later Brown brings the automobile to Adams for repairs. The balance of about \$500 on the purchase price of the car is overdue at the time Adams receives the car back in his shop for repairs. The repair bill amounts to \$50 which Brown offers to pay and Adams consults you as to whether or not he may hold the automobile until the balance of the purchase price is paid. How would you advise him?

#### Answer 256.

Adams has a right to hold the machine for the balance of the purchase price, as he has a lien thereon.

## OHIO SUPREME COURT

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General Code, 8434-4 provides that the seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Question 257.

On January 1st, Miller who had an account with Baldwin, a stockbroker, pledged with Baldwin certain bonds then having a market value of \$5,000 as security for a loan payable on or before June 1st. On February 1st Baldwin pledged these bonds, together with securities of other clients to the Xenia Bank to secure a loan of \$20,000 repayable May 1st. On that date Baldwin discharged his obligation to the Xenia Bank and received back Miller's bonds. Thereafter Miller failed to pay his indebtedness to Baldwin who after due notice sold the bonds at public sale for \$4,000. Baldwin sues Miller to recover the amount of Miller's indebtedness to him, crediting Miller with \$4,000 on account of the bonds. Miller claims he should be credited with \$5,000. What decision?

Answer 257.

Miller should only be credited with \$4,000.

If the cause of action does accrue, the damages will be the market value of the stock at the time of the accrual. *Fosdick vs. Greene*, 27 O. S., 484.

Unlike the interest of the lien holder the interest which the pledgee acquires is transferable. He may sub-pledge, or he may even deliver it to a bailee to hold for him. *Dobie on Bailments*, p. 204.

Question 258.

Jones, a mill owner is indebted to Simmons, a dealer in grain and flour, and it is agreed between them that Simmons is to stock Jones' mill with wheat which is to be ground into flour by Jones, and sold by Simmons, and that from the proceeds of such sale, Simmons is to deduct the cost of the wheat and a commission on the sale of the flour, and the debt due him, from Jones, and after these deductions, pay over any balance that may remain to Jones. Davis, another creditor attaches the wheat in the mill and Simmons consults you as to whether or not he can replevy it from the sheriff. How would you advise him?

Answer 258.

Simmons has a right to replevy the goods from the sheriff. This transaction is a bailment and the title is at all times in Simmons. *Johnson vs. Miller*, 16 Ohio, 481.

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### Question 259.

Smith permitted his friend Jackson to use his automobile one evening. Jackson drove the automobile negligently and collided with Watkins, who was also driving his automobile in a negligent manner. Smith's automobile was damaged by the collision and Smith brings action against Watkins to recover for the damage to the automobile. The evidence tended to prove that the collision occurred through the concurrent negligence of Watkins and Jackson. What judgment?

### Answer 259.

Judgment for the plaintiff Smith. It is held in Ohio that where the property is in the hands of the bailee that the negligence of the bailee will not be imputed to the bailor, so to defeat a recovery by the bailor against a third person. *Gfell vs. Jefferson Hdwe. Co.*, 31 O. C. A., 214.

### Question 260.

Brown, a county sheriff, receives a sum of money, from sale of lands, by order of court in partition case. Pending an order of distribution, he deposits this money in a savings bank of which he is a director and in which he has been depositing such funds to the credit of an account standing in the name of Brown as sheriff. The bank has good standing in the community but its financial condition is not good, and Brown as director knows that fact. Before the fund was paid out the bank failed and the parties in the partition case consult you as to remedy, if any, against sheriff Brown. How advise?

### Answer 260.

The sheriff is not liable. The transaction is a bailment. 13 O. C. C., N. S., 213.

# **OHIO STATE BAR EXAMINATION**

**JUNE, 1921**

## **BAILMENTS**

**Question 261.**

- (a) Define Bailment.
- (b) Distinguish Bailment in a general way from a Sale—an Exchange—a Gift.

**Answer 261.**

(a) A bailment is the relation created through the transfer of the possession of goods or chattels, by a person called the bailor to a person called the bailee, without a transfer of ownership, for the accomplishment of a certain purpose, whereupon the goods are to be dealt with according to the instructions of the bailor. Dobie on Bailments, p. 1.

(b) In a SALE, ownership or title must pass, while possession either may or may not pass; in a bailment, ownership must not pass, but possession must. Dobie on Bailments, p. 6.

In a GIFT, title passes only upon delivery of the goods; while in a bailment possession passes, but the title does not. Hale, pp. 6-8.

In an EXCHANGE, there is a delivery of goods, not to be returned in specie, but to be replaced by other goods of the same kind. Hale, p. 36.

**Question 262.**

A bank received a parcel of bonds for safe keeping and by agreement of the bailor and bailee the bonds were made a standing security for the payment of loans to be made by the bank to the owner of the bonds.

The bank was notified that the assistant cashier, who had free access to the bonds, was a person of scant means and engaged in the speculation of stocks. He stole the bonds. Was or was not the bank liable for the bonds? Why?

**Answer 262.**

The bank is liable.

A gratuitous bailee of United States bonds is required to exercise such care as good business men would use in

## BAR EXAMINATIONS

keeping such valuables. *Bank vs. Zent*, 39 O. S., 105; III Longs. Notes, 1010.

### Question 263.

A wrote to B "I have a customer for a diamond, send me some. I may have to keep them for ten days or two weeks." B forwarded a number of stones with a memorandum thereof which recited "These goods belong to us until paid for."

Soon after A received the stones they were stolen from him. In his letter to B informing him of the theft, he asked him to send duplicate bills, telling him not to be alarmed as he would pay them every cent he owed them.

Assuming that A used only ordinary care, is he liable for the theft of the stones?

### Answer 263.

This was a bailment for the benefit of both the bailor and bailee and the bailee is legally bound to exercise ordinary care. Having done so, he is not liable.

"Loss of property deposited, to be kept without reward, and returned on demand, creates a liability only in case of gross negligence. The jury is to determine what is such gross negligence under proper instructions." *Griffith vs. Zipperwick*, 28 O. S., 388; III Longs. Notes, 413.

### Question 264.

A, the owner delivered to, and B accepted, an automobile which was to be retained by B for an appreciable length of time for the sole purpose of making repairs when the nature and extent should be ascertained.

B, without the knowledge of A, under a written order signed by A's daughter, acting in good faith and under a well founded belief that he had a right so to do, delivered the car to A's chauffeur. The chauffeur wrecked the car while using it for his own purpose.

Is B liable? Give reason for answer.

### Answer 264.

The bailee, having used the article beyond the scope of the bailment, has become liable as a tortious bailee, and is an insurer of the property.

The agency of the daughter for the father could not be established by the written order signed by her, and the bailee's belief whether well founded or not, will not affect the legal rights of the parties.

"A bailee is liable in an action of tort for an injury to the property bailed, occurring during a use of it by him, or by others with his consent, which was neither expressly nor impliedly authorized by the contract of bailment, even though the injury was the result of accident, and not of negligence. Dobie on Bailments, p. 40.

Question 265.

A delivered to a railway company, as a common carrier, at a city in Ohio, a consignment of merchandise consigned and billed to a city in Wisconsin.

After an antecedent delay of five days, without other act of negligence, the merchandise was completely destroyed by an extraordinary and unprecedented flood.

Is the company liable for the loss? Why?

Answer 265.

Where an extraordinary and unprecedented flood has destroyed a consignment of goods in the possession of a bailee for transportation, an antecedent delay, without other act of negligence, will not render the bailee responsible for the damage caused by such flood. (Daniels et al. vs. Ballantine et al., 23 O. S., 532.) This rule of liability applies to a common carrier as well as to other bailees, and has been adopted by our Federal tribunals. T. & O. C. Ry. vs. Kibler, 97 O. S., 262.

Question 266.

A bailee received a bill of exchange which he agrees to collect and does collect quarterly and places the amount to his own credit in a bank which failed.

Is the bailee liable? Why?

Answer 266.

The bailee is liable, as the relation between him and the bank is that of debtor and creditor.

"One carrying bank notes for another gratuitously is not liable if he took the same care of them as his own, otherwise he is. But if he used them and substituted other bills, it is a debt, and the theft of the latter is no excuse." Anderson vs. Foresman, W, 598; I. Longs. Notes, 47.



**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

**BAILMENTS**

**Question 267.**

A, under contract of bailment with B, delivered to B an automobile. C stole the automobile from B. B later located the machine in C's possession. Can B maintain action in replevin against C? Give reasons.

**Answer 267.**

B can maintain the action against C.

"The possession of specific personal property may be recovered in an action as provided in this chapter" (Replevin.) Ohio Gen. Code, 12051.

The bailee, being entitled to possession under his contract of bailment, can therefore maintain replevin.

**Question 268.**

(a) Define confusion of goods.

(b) Define Act of God with respect to common carriers' liability.

(c) Is it sufficient, in order that a common carrier may escape liability, that the Act of God be the proximate cause of the loss?

**Answer 268.**

(a) Confusion of goods takes place when there has been such an intermixture of goods owned by different persons that the property of each can be no longer distinguished. *Grossman vs. Wenkam*, 10 O. C. C., 348.

(b) The term "Act of God" in its legal significance means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods. It is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such natural cause without human intervention. It must proceed from the violence of nature, or the force of the elements alone, and with which the agency of man had nothing to do. *City of Piqua vs. Morris*, 98 O. S., 42.

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(c) It is sufficient.

"Where an extraordinary and unprecedented flood has destroyed a consignment of goods in the possession of a bailee for transportation, an antecedent delay, without other act of negligence, will not render the bailee responsible for the damage caused by such flood." *Daniels et al. vs. Balentine et al.*, 23 O. S., 532.

This rule of liability applies to a common carrier as well as to other bailees, and has been adopted by our Federal tribunals. *T. & O. C. Ry. vs. Kibler*, 97 O. S., 262.

Question 269.

A shipped goods over the N. & W. Railroad under a contract according to the terms of which the company was not to be liable for any loss of or injury to the goods while in transit. The car in which the goods were shipped was wrecked, and the goods destroyed. A sued the railroad company for damages. The company plead the contract exempting it from liability.

Can A recover? If so, why? If not, why not?

Answer 269.

A can recover because a contract of a common carrier relieving itself from liability for negligence is against public policy.

"A carrier may insert in a bill, issued by him, any other terms and conditions (further than the formal requirements as set forth in G. C. 8993-1) provided that such terms and conditions shall not

1. Be contrary to law or public policy, or

2. In any wise impair his obligation to exercise at least that degree of care in the transporting and safekeeping of the goods entrusted to him which a reasonably careful man would exercise in reference to similar goods of his own. *Ohio Gen. Code*, 8993-2.

Question 270.

(a) Can one take possession of another's chattels, except as purchaser or donee, without being to some extent a bailee?

(b) Name twelve of the most common of public bailees.

Answer 270.

(a) No.

"Though possession must pass in order that there may be a bailment, such possession must pass alone, and not

## BAR EXAMINATIONS

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in connection with, or as incident to, ownership. If ownership passes, either with or without possession, the transaction becomes, not a bailment, but a gift or sale." Dobie on Bailments, Chap. 1, Sec. 1.

- (b) (1) Railroads.
- (2) Steam Ship Lines.
- (3) Express Companies.
- (4) Innkeepers.
- (5) Pawn Brokers.
- (6) Taxicab Companies.
- (7) Parcel Post.
- (8) Safe Deposit Companies.
- (9) Laundries.
- (10) Dry Cleaners.
- (11) Automobile Repairers.
- (12) Jewelers.

Question 271.

Jones, traveling along public highway, finds thereon a valuable fur robe and takes possession.

(a) What title, if any, does he take to the article, except as against the owner?

(b) For what degree of care is he liable with respect to the owner?

(c) Can he insist as a matter of right to the payment of a reward?

Answer 271.

(a) The finder of lost goods does not, by such finding, acquire the ownership of the goods, yet he has such a possessory right as will enable him to keep the goods as against all but the rightful owner and the finder may make, subject to the rights of the owner, a valid bailment of the goods. Dobie on Bailments, p. 25.

(b) A finder of lost goods, who takes them into his possession, becomes a bailee of the goods. Dobie on Bailments, p. 23.

The most important depositaries from a legal standpoint are finders of lost goods and banks receiving "special" deposits. A depositum is a bailment of goods for mere custody, without recompense. Id., p. 48.

Hence the finder is only legally bound to exercise slight care over the goods.

(c) When no reward is offered, the courts agree that

## OHIO SUPREME COURT

no compensation can be claimed merely for finding the goods. Dobie on Bailments, p. 60. Question 272.

Same state of facts:

(a) May he charge for the necessary expense and labor in the care of article?

(b) What title, if any, would pass to a buyer of the robe, acting in good faith and without notice?

Answer 272.

(a) The finder could claim reasonable expenses necessarily involved in keeping the goods. Dobie on Bailments, p. 60.

(b) The same title the vendor had, to wit such a possessory right as would enable him to keep the goods as against all but the rightful owner. Dobie on Bailments, p. 25.

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### NEGOTIABLE INSTRUMENTS

Question 273.

(a) What must appear in a written instrument to make it negotiable?

(b) What do you say as to negotiability of the following instruments and how would title be transferred?

(1) "Alpha, Ohio, Sept. 5, 1911

On or before August 1, 1912, I promise to pay to the order of A. J. Roe, One Hundred dollars in money and Fifty dollars worth of wheat for value rec'd.—S. J. Poe."

(2) "June 1, 1918. I owe you Twenty seven and 50/100 Dollars.—C. Worth."

(3) A share of stock in the Atlantic & Western R. R. Company.

(4) A \$10 bill issued by one of the U. S. Banks of Columbus, Ohio.

Answer 273.

(a) An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;

2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer; and

5. When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. Gen. Code, 8106.

(b) (1) Not negotiable, as not sum certain in money. Title can be assigned by indorsing the instrument.

(2) Not negotiable, as not payable to order or bearer. Title can be assigned by indorsement or delivery.

(3) Is negotiable under the uniform transfer act. See Gen. Code, 8673-1 to 8673-7.

(4) Is negotiable, being payable to bearer. Title is transferred by delivery.

Question 274.

What is the effect of a bank check upon the funds of the maker in the bank named after issue and prior to its being honored by the bank?

Answer 274.

No effect.

A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check. Gen. Code, 3294.

Question 275.

A gave B a check after having it certified by proper bank officials and then before its payment stopped payment thereof by the bank. To enforce payment whom must B sue? Why?

Answer 275.

The bank, because it has made itself primarily liable.

When a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. Gen. Code, 8292.

Certification of a check is equivalent to an acceptance and raises an implication that it is drawn upon sufficient funds in the hands of the drawee, which have been set apart for its satisfaction and will be so applied when the check is presented for payment; hence the drawer of the check may not stop payment on it after its certification. *Blake vs. Bank Co.*, 79 O. S., 189.

Question 276.

K was security on a note made in Ohio. The principal at request of the payee without the knowledge of K added these words to the note as already signed by K, "with all reasonable attorney's fees." What defense did K have, if any, when the payee sued, and why?

Answer 276.

The defense of a material alteration, which in this case would release the surety.

"Changing a note by adding thereto the words, 'with all reasonable attorneys' fees' (although such words have no legal effect in this state) is a material alteration."

Such alteration, when made by the principal with the knowledge and consent of the owner and holder, but without

## BAR EXAMINATIONS

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the knowledge and consent of the surety, discharges the surety." *Kerr vs. Hedges*, 6 O. C. C., 604.

Question 277.

Define and give an example of an accommodation maker and of an accommodation endorser.

Answer 277.

An accommodation party is one who signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding the holder at the time of taking it knew him to be only an accommodation party. Gen. Code, 8134.

One signing a promissory note on the face as surety for the maker is liable to the payee and subsequent parties. *Richards vs. Bank Co.*, 81 O. S., 348.

One who signs the instrument on the back, without receiving value therefor, for the purpose of giving credit to the instrument, is an accommodation indorser.

Question 278.

What is an endorsee, and if there are three endorsers on a note, whom may the second endorsee sue to enforce collection?

Answer 278.

An endorsee is a transferee who receives the instrument by indorsement.

An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery. If payable to order, it is negotiated by the indorsement of the holder completed by delivery. Gen. Code, 8135.

The second endorsee may sue the maker and the first endorsee.

As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Gen. Code, 8173.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

**NEGOTIABLE INSTRUMENTS**

**Question 279.**

John Smith procures Thomas Brown to become surety at the bank for \$1000 borrowed by him. In executing the note both appear as principals. Brown is compelled to pay the note when due. Can he recover the money from Smith, or is he estopped by the terms of the note?

**Answer 279.**

Brown is an accommodation maker and can recover from Smith. An accommodation party is one who signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Gen. Code, 8134.

Parol evidence is admissible to show both the accommodation character of the signature and the party accommodated; but the rule must be carefully applied so as not to defeat the purpose and effect of written instruments and such parol contract must be established by clear, precise and indubitable evidence. Selover on Negotiable Instruments, p. 102.

An accommodation maker compelled to pay the note may sue the accommodated parties to recover the amount paid and interest; though, it should be noted, such suit is not one based on the note. Selover on Negotiable Instruments, p. 104.

**Question 280.**

(a) In what cases may the maker of a note defend against the same in the hands of an innocent holder for value?

(b) Why is it necessary to protest a note when due, the same having several times been transferred before due by endorsement?

**Answer 280.**

(a) A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for its full amount against all parties liable thereon. Gen. Code, 8162.



It is clear that defects appearing on the face of the paper at the time of its transfer to the holder are not "equities," which he can escape; nor are matters which, though not apparent on the face of the paper, render the contract void ab initio, such as illegality of consideration in cases where, by statute, the illegality renders the contract void, incapacity of prior parties and want of authority in the officers of a public corporation to execute negotiable instruments. Selover on Negotiable Instruments, p. 232.

When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative. No right to retain the instrument, give a discharge therefor, or to enforce its payment against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. Gen. Code, 8128.

When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof, according to its original tenor, Gen. Code, 8229.

(b) It is not necessary to protest a note when due, although there may be a number of indorsers. The only instrument requiring protest is a foreign bill of exchange, and in this case, protest is necessary for the purpose of fixing the liability of the indorsers.

"Negotiable instruments other than foreign bills may be, but need not be, protested for non-acceptance or non-payment." Selover on Negotiable Instruments, p. 269.

When a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and when such a bill, which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. When a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary. Gen. Code, 8257.

Question 281. What is a "Promissory Note," "Joint Note," "Joint and Several Note?"

Answer 281. Within the meaning of this chapter, a negotiable promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. When a note is drawn to the makers own order, it is not complete until indorsed by him. Gen. Code, 8289.

A joint note is one signed by more than one person, and where there liability is said to be joint as distinguished from joint and several. When their undertaking is joint, unless they waive the advantage by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by the operation of a bankrupt or insolvent law, or is not liable on the ground of infancy. Bouvier's Law Dictionary.

A joint and several note is one on which the creditor may sue one or more of the parties to such liability separately, or all of them together at his option. Bouvier's Law Dictionary.

When an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. Gen. Code, 8122-7.

Question 282. The payee of a note writes his name on the back thereof and thereupon transfers it to another.

(a) In what way is he liable?

(b) Is he entitled to notice of failure to pay by the maker when due?

Answer 282. (a) He is an indorser, and liable as such. The indorsement must be written upon the instrument itself, or upon a paper attached to it. The signature of the indorser without additional words is a sufficient indorsement. Gen. Code, 8136.

(b) He is entitled to notice of failure to pay.

Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and

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## BAR EXAMINATIONS

to each indorser. Any drawer or indorser to whom such notice is not given is discharged. Gen. Code, Sec. 8194.

Question 283.

(a) What is the legal rate of interest on a note in Ohio?

(b) In the event a note bears usurious interest and the same with the principal is paid when due, can the usurious part be recovered back?

Answer 283.

(a) The legal rate is six per cent per annum. Gen. Code, 8305.

The parties may stipulate for the payment of interest at any rate not exceeding eight per cent per annum, payable annually. Gen. Code, 8303.

(b) Under these circumstances, the usurious part cannot be recovered back; being money paid voluntarily, with full knowledge of all the facts.

Question 284.

What is meant by:

- (a) "Bona Fide Holder."
- (b) "Without Recourse."
- (c) "Endorsement?"

Answer 284.

(a) A "bona fide holder" in the code is called a "holder in due course."

One is a holder in due course who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it previously had been dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Gen. Code, 8157.

(b) A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument. Gen. Code, 8143.

(c) Indorsement means writing one's name on the back. "Indorsement means an indorsement completed by delivery." Gen. Code, 8295.

"An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery. If payable to order it is negotiated by the indorsement of the holder completed by delivery." Gen. Code, 8135.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

**NEGOTIABLE INSTRUMENTS**

**Question 285.**

A, having an account in bank, gives B a check for \$100 for stock in an oil company. At B's request the check is made payable to "cash." Later A learns that the stock is worthless and notifies his bank to stop payment on the check. In the meantime B has obtained the money on the check from C, who did not know that the check had been fraudulently obtained or that payment on it had been ordered stopped. Can C compel the payment of the check; assuming that A at all times had on deposit in the bank funds sufficient to cover the amount of the check? Give reasons for your answer.

**Answer 285.**

C is entitled to a judgment against A for the amount of the check. The title of B was a defective title, and C, as a holder in due course, holds the instrument free from the defect.

"The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force or fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Gen. Code, 8160.

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties, among themselves, and may enforce payment of the instrument for its full amount against all parties liable thereon." Gen. Code, 8162.

**Question 286.**

State the essentials as to form that must appear in a written instrument to make it negotiable.

**Answer 286.**

An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer;

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2. Must contain an unconditional promise or order to pay a sum certain in money;

3. Must be payable on demand, or at a fixed or determinable future time;

4. Must be payable to order or to bearer; and

5. When the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. Gen. Code, Sec. 8106.

Question 287.

(a) What is the presumption, if any, as to the consideration in a negotiable instrument?

(b) What is meant by "an accommodation party."

(c) What is the rule as to his liability?

Answer 287.

(a) Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon, to have become a party thereto for value. General Code, Sec. 8129.

(b) An accommodation party is one who signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Gen. Code, 8134.

(c) Such a person (an accommodation party) is liable on the instrument to a holder for value, notwithstanding the holder at the time of taking it knew him to be only an accommodation party. Gen. Code, 8134.

Question 288.

What constitutes negotiation of an instrument that is negotiable?

Answer 288.

An instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery. If payable to order it is negotiated by the endorsement of the holder completed by delivery. Gen. Code, 8135.

Question 289.

(a) What is meant by "holder in due course?"

(b) What are his rights?

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**Answer 289.** **INDIANAPOLIS, INDIANA**

(a) One is a holder in due course who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. Gen. Code, Sec. 8157.

(b) A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment for its full amount against all parties liable thereon. Gen. Code, Sec. 8162.

**Question 290.**

What is the liability of a person, not otherwise a party to the instrument, who places his signature thereon in blank before delivery?

**Answer 290.**

Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. Gen. Code, 8169.

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**DECEMBER, 1920**

**NEGOTIABLE INSTRUMENTS**

**Question 291.**

What is the difference, if any, between the liability of an indorser and that of an unconditional guarantor of negotiable paper?

**Answer 291.**

Inasmuch as the contract of a guarantor is to give the creditors security, the guarantor is liable in case the maker fails to perform his obligations under the contract.

The contract of the endorser is that in case the maker of the instrument does not pay at maturity upon proper presentment, and demand being made, notice being given, and in the case of foreign bills of exchange, protest is made, that under these circumstances the endorser will pay the instrument according to its terms to the holder thereof.

**Question 292.**

(a) If you are the holder of a check and delay presentment for payment, is the drawer of the check discharged?

(b) If you execute a note and specify no time for payment, but agree to pay interest on the same, annually, when is the note due?

(c) If you accept a note for an obligation owing to you, does this extinguish the debt?

**Answer 292.**

(a) General Code 8291. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

(b) This note is payable on demand. Gen. Code, 8112.

(c) In Ohio the execution and delivery of a promissory note does not discharge the debt for which it is given, unless the parties have made an express contract that this debt shall be discharged. In the absence of such express agreement, the new note operates as an extension of time for paying such debt, until the maturity of such note; and if such note is not paid when it is due, the creditor may return such note to the debtor and may bring an action upon the original obligation. In Re: Manufacturing Co., 62 Bull, 361.



**Question 293.**

Smith is the payee of a promissory note, payable to himself or order. He indorsed it in blank and offered it to Brown in payment of a debt. Brown refused to accept the note unless Allen, a stranger to the note, signed it. Allen then signed the note before maturity and Brown accepted it.

(a) What is the relation of Allen to the indorser of the note?

(b) From whom may Brown recover, and in what order? Give reasons.

**Answer 293.**

(a) Allen is an accommodation endorser.

(b) Brown may recover from Smith and then from Allen. See Gen. Code, 8169-3.

**Question 294.**

A executed and delivered to B his promissory note for \$500 due in one year. There was attached to the note a power of attorney to confess judgment. Before maturity B transferred the note to C. After maturity, and after due notice to A, C exercised the right to confess judgment and obtained judgment against A.

(a) Did the power of attorney destroy the negotiability of this note?

(b) Did C have the right to obtain judgment by confession as provided by the power of attorney? Give reason for your answer in each case.

**Answer 294.**

(a) The power of attorney does not destroy the negotiability of this note. See Gen. Code, 8110-3, which provides that the negotiability of an instrument is not affected by the fact that it contains a power of attorney to confess judgment.

(b) He has a right to obtain judgment on this note because by the negotiation of the instrument to him he acquired all the rights that B had thereunder. This of course, is assuming that the power of attorney was to A or to any holder of the note. Selover on Neg. Insts., P. 88.

**Question 295.**

(a) The holder of a check indorsed by the payee had it certified at the bank on which it was drawn. The next day the bank failed. What are the holder's rights against the drawer and the payee, if any, and why?

(b) X and Y executed their joint note payable to A. After delivery to A he substituted the name of B for his own

as payee. X paid the note when due without suit and then brought an action against Y for contribution.

Was X entitled to recovery from Y, and why?

Answer 295.

(a) The holder has no right against the drawer nor the payee, on account of the statute.

General Code 8293. When the holder of a check procures it to be accepted or certified, the drawer and all endorsers are discharged from liability thereof.

(b) X is not entitled to recover from Y.

Section 8229. Ohio General Code. When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against the party who has himself made, authorized or assented to the alteration and subsequent endorsers.

Question 296.

Jones, acting admittedly and to the knowledge of all parties as agent of Brown in the purchase of merchandise from Smith, in consideration of the merchandise so purchased, executed and delivered to Smith the following note properly dated:

"Thirty (30) days after date, I promise to pay J. B. Smith or order Three Hundred Dollars (\$300).

(Signed) A. C. JONES, Agent."

Is Smith's right of recovery on the note one against Brown, or against Jones, or against both? Give reasons for your answer.

Answer 296.

Jones is liable on the note.

The mere addition of words describing him (the signer) as an agent or as filling a representative character without disclosing his principal does not exempt him from personal liability. Gen. Code, 8125.

The addition of the word "agent" to the signature of the maker of a promissory note renders such maker liable personally. Collins vs. Insurance Co., 17 O. S. 215.

Brown is not liable on the note.

No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. Gen. Code, 8123.

Even prior to this statute, a party could not be added to a negotiable instrument by parol. Burkhardt vs. Zimmerman, 1. O. D., N. P., 659; 32 Bull., 138.

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**JUNE, 1921**

**NEGOTIABLE INSTRUMENTS**

**Question 297.**

One E, a German, unable to read or write the English language, without any negligence on his part, signed a negotiable promissory note, on the false and fraudulent representation of the payee that the instrument was a contract providing the terms of his employment as an agent to sell certain manufactured articles for the payee. The payee endorsed and transferred the note before maturity and for value to one W, who had no knowledge or notice of the fraud practiced on E.

Can W recover against E on the note? Give reasons.

**Answer 297.**

One who signs a promissory note in reliance on the fraudulent representations of the payee, that such instrument is of a different character, is not liable to a bona fide holder, if such maker was not negligent in relying upon such representation. *DeCamp vs. Hamma*, 29 O. S., 467.

A bona fide holder is subject to defenses which go to the execution of the note, unless the maker himself was negligent; in which case the maker is said to be estopped to deny the validity of the note as against the bona fide holder. *DeCamp vs. Hamma*, 29 O. S., 467; *Ross vs. Doland*, 29 O. S., 473; *Winchell vs. Crider*, 29 O. S., 480.

**Question 298.**

A bank in the ordinary course of its business, discounts for a customer a negotiable promissory note before maturity and without notice of any infirmity in the note discounted. Instead of paying the customer the proceeds of the note in money, it passes the same to his credit as a depositor in the bank.

State whether or not this makes the bank a holder of the note in due course with respect to any defense against the note that the maker could have set up against the payee, the bank customer who had the note discounted?

Give reasons for your answer.

**Answer 298.**

If a negotiable instrument is discounted with a bank,

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and the proceeds thereof placed to the credit of the party who discounts it, and he is allowed to check but part of such proceeds, a valuable consideration will be regarded as being furnished, although the rest of the proceeds were applied to the payment of an antecedent note; and the court will not inquire how much was checked out and how much was thus applied. *Bank vs. Crawford*, 2 C. S. C. R., 125. Therefore the bank is a holder in due course.

### Question 299.

State what effect an endorsement by the payee on a note "without recourse" has on the endorsee's position as a holder in due course, so far as his right to recover against the maker is concerned?

### Answer 299.

Such an indorsement does not impair the negotiable character of the instrument. *Gen. Code*, 8143.

### Question 300.

A, solely for the accommodation of B and without consideration therefor, executed and delivered a negotiable promissory note to B, who after the maturity thereof endorsed and transferred the note for value to C, who had no notice of the accommodation character of the note.

Has C a right to recover against A on the note? Give reasons for your answer.

### Answer 300.

C has a right to recover against A on the note.

An accommodation party is one who signed the instrument as maker, drawer, acceptor or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value notwithstanding the holder at the time of taking it knew him to be only an accommodation party. *Gen. Code*, Sec. 8134.

### Question 301.

A negotiable promissory note which was subject to a defense in favor of the defendant maker against the payee, was endorsed by the payee in blank and negotiated to a holder in due course. At maturity the note was taken up by the payee and thereafter transferred without further endorsement to plaintiff who paid value therefor without notice of the facts constituting the makers defense.

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Is the plaintiff entitled to recover on the note against the defendant?

Give reasons for your answer.

Answer, 301.

The plaintiff is not entitled to recover on the note against the defendant.

A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. Gen. Code, 8163.

But a payee who transfers a note to a bona fide holder, and afterward repurchases it for a new consideration, is not a bona fide holder. In a case deciding this point (*Kost vs. Bender*, 25 Mich., 515) the court said "It cannot be very important to him (the innocent transferee from the payee) that there is one person incapable of succeeding to his equities, and who consequently would not be likely to become a purchaser. If he may sell it to all the rest of the community, the market value of his security is not likely to be affected by the circumstances that a single individual cannot compete for its purchase, especially when we consider that the nature of negotiable securities is such that their market value is very little influenced by competition. *Selover on Negotiable Instruments*, p. 241.

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### NEGOTIABLE INSTRUMENTS

#### Question 302.

X, a contractor, had a contract for the construction of a centralized school building in Washington Township, Miami county, Ohio. He had in his employment Z, who on quitting asked X for the amount due him. X said to him I cannot pay you now but will give you my note for the amount due, payable on final estimate, which note Z accepted. Is or is not this a good note, and why?

#### Answer 302.

The note is not a negotiable instrument, not being payable at a fixed or determinable future time.

"An instrument is payable at a determinable future time within the meaning of this chapter, which is expressed to be payable;

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed, period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain." Ohio. Gen. Code, 8109.

#### Question 303.

You received from S, a client in New York, a claim for collection against R of your city. You call upon R for payment and he gives you his check for the amount of the claim. You take the check to the Bank and have it certified as good. You then send it to your client in New York, who on receipt of same deposits it in bank to his credit. Before the check arrives at the bank which certified it as good, the bank fails and there is a loss. Whose loss it it?

#### Answer 303.

It is the client's loss.

"When the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon." Ohio Gen. Code, 8293.

#### Question 304.

A being indebted to B in the sum of \$500 gives B his check for same payable at the First National Bank. B pre-

## **BAR EXAMINATIONS.**

sents the check to said bank for payment, which was refused. There was sufficient money in the bank with which to pay the check. Payment was not stopped by the drawer of the check. B consults you as to bringing suit against the bank. Can B maintain such action, and why?

**Answer 304.**

B cannot maintain an action against bank.

"A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Ohio Gen. Code, §294.

"This we think is intended to cover the liability of a bank to the holder of a check, and he can recover from the bank only when he brings himself within the provisions of this statute. If a check is neither accepted nor certified there is no liability on the part of the bank to the holder." Savings Co. vs. Walker Bin Co., 92 O. S., 406.

**Question 305.**

A is indebted to B in the sum of \$100 for work done by B for A. A has committed a felony which B knows about. B said to A, if you will give me your note for \$150, one hundred of which is to pay me for labor performed and fifty dollars for keeping still, I'll not tell any one of your felony. A gave B his note for said amount of \$150. Is this note valid, and why?

**Answer 305.**

The note is defective as to title in that part of the consideration is illegal. As the consideration is indivisible, the note would not be good, except in the hands of a bona fide holder.

"The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Ohio Gen. Code, §180.

**Question 306.**

\$500.00

Piqua, Ohio, July 1, 1920.

November 1, 1920, after date, I promise to pay to bearer the sum of Five Hundred Dollars, with interest at the rate of six per cent per annum. Value received.

(Signed) JOHN DOE

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On the 30th day of August, 1920, the above note was stolen from B a bona fide holder by C a thief. On the 5th day of September, 1920 C sells the note to D for a valuable consideration, who is a bona fide holder and who knows nothing about the theft of the note. Can D recover from A the amount of the note and interest?

**Answer 306.**

D is entitled to recover the amount of the note and interest from John Doe.

"When the instrument is in the hands of a holder in due course, a valid delivery of it by all parties prior to him so as to make them liable to him is conclusively presumed." Ohio Gen. Code, 8121.

**Question 307.**

A note is given by J of Cincinnati, Ohio, to K of Pittsburgh, Pennsylvania. It is indorsed by L of Albany, New York, at Albany, New York; by M of Wheeling, West Virginia, at Wheeling, West Virginia; and By N of Baltimore, at Baltimore, Maryland.

The law of what state governs as to the indorsement of L, M and N?

**Answer 307.**

New York as to L; West Virginia as to M; Maryland as to N.

"The indorser of a bill or note is regarded as undertaking to pay at the place where his indorsement is made, in the event of dishonor and due notice, for the reason that he is, in effect, the drawer of a new bill at the place where, and the time when, he makes the indorsement and is not considered as merely adopting date of place and time of the bill or note which he indorses. And he is bound by the law of the place or indorsement even though the bill or note be expressly payable elsewhere." Daniels on Negotiable Instruments., Vol. 1, Sec. 899.



## **OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

### **AGENCY**

#### **Question 308.**

A bought a ticket at a theater window and after receiving and paying for it complained to the seller about some discourtesy, which brought on a quarrel. A was assaulted and injured by the ticket-seller. Whom would you advise A to sue, if anybody, and why?

#### **Answer 308.**

The ticket seller.

A master is not responsible for the wrongful act of his servant, unless that act be done in execution of the authority, express or implied, given by the master. Beyond the scope of his employment the servant is as much a stranger to his master as any third person and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master. *Railroad vs. Wetmore*, 19 O. S., 110.

#### **Question 309.**

C met D, who was agent for an auto insurance company, on the street and told the latter to place \$1000 accident insurance on an automobile he had that morning purchased. D told him he would mail him the policy and the bill which he did the next day, the policy and the bill being of that same date. An hour after the conversation C's machine was damaged in a collision. The company refused to settle. C sued. Can he recover, and why?

#### **Answer 309.**

C can recover. A valid contract of insurance may be made by parol, when not forbidden by statute, or a provision of the company's charter which has been brought to the knowledge of the other contracting party. *Machine Co. vs. Insurance Co.*, 50 O. S., 549.

#### **Question 310.**

When, if ever, do the unauthorized acts of an agent become enforceable against the principal?

#### **Answer 310.**

- (1) When the principal ratifies the act done.

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(2) When the principal is estopped to deny the authority of the agent.

(3) When the agency is one by necessity. Huffcut on Agency, Sec. 9.

Question 311.

A employed B to buy a piece of business property of C. B entered into a written contract in his own name with C for the purchase without disclosing his principal. Delay arose due to a blemished title. Pending correction of that A became insolvent. C sued B to enforce contract and B defended on ground that he was agent only for A.

Who should prevail, and why?

Answer 311.

C should prevail.

Where a contract is signed by the agent, the name of the principal not appearing on the instrument and the party dealing with the agent knows of the principal, parol evidence is not admissible to change the legal effect of such contract so as to bind the principal. *Post vs. Kinney*, 7 Dec. Rep., 439; 3 Bull. 118; See *Higgins vs. Senior*. 8 Meeson & Welsby, 834 (Mechem—Cases on Agency, p. 456.)

Question 312.

A tenant sometimes paid his rent directly to his landlord and sometimes without being told to do so, left it at the house of a neighbor where the landlord took it up. The landlord being absent from town for some time, the neighbor meanwhile absconded with the rental money left with him. The landlord sued tenant for the money taken. Who should prevail, and why?

Answer 312.

The landlord should prevail.

This is on the principal that where one of two innocent persons must suffer from the wrongful act of a third, the one who put it in the power of the wrongdoer to commit the wrong, must bear the loss. See *Nolte vs. Hulbert*, 37 O. S., 445.

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### AGENCY

#### Question 313.

A is employed on commission by B to purchase a certain lot of land from C. A has been similarly employed by C to sell that land, but B does not know this. A tells C of his employment by B, and with C's consent and knowledge negotiates the sale of the property to B. Both B and C refuse to pay A any commission, and he consults you. How would you advise him?

#### Answer 313.

A cannot recover commission from either B nor C.

"The double agency of a real estate broker who assumes to act for both parties to an exchange of land involves, *prima facie*, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from either party." *Bell vs. McConnell*, 37 O. S., 396; (*Also Capener vs. Hogan*, 40 O. S., 203.)

#### Question 314.

Williams hears that Johnson is about to sell a lot of sugar and thinks that his friend Gray who is away from home, would like to buy it. Williams thereupon enters into a contract with Johnson for the purchase of the sugar on behalf of Gray, signing Gray's name and telling Johnson that he has no authority to act as agent, and that the contract will have to be approved by Gray. Williams writes to Gray what he has done, and Gray promptly telegraphs Johnson "I ratify sugar contract." The price of sugar goes up, and Johnson will not sell. What are Gray's rights in the matter?

#### Answer 314.

Gray has a right of action against Johnson for damages for breach of the contract of sale, the amount of damages

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being the difference between the contract price and the market price of the sugar.

"Where one person, whether no agent for any purpose, or an agent exceeding his authority, does an act as agent in the name of or on behalf of another in excess of authority (if any) conferred upon him, the person in whose name or on whose behalf the act was done may ratify the act and thereby give to it the same legal effect as if the one doing it had been in fact an agent, or, being an agent for some purposes, had been in fact authorized to do the act in question." Huffcut on Agency, Chap. III, Sec. 30 (2).

Question 315.

Williams, in haste to reach his home in the suburbs of the city, hails a passing taxicab and tells the chauffeur to take him home as quickly as possible, and says that if he gets there in ten minutes he will pay an extra dollar as a tip. That would involve the violation of a city speed ordinance, and the chauffeur's duty under the terms of his employment with the taxicab company is to report back at the company headquarters after every trip and to make no trips except from that place. But the chauffeur accepts the offer and drives at a high rate of speed, knocking down Smith who is carefully crossing the street. Smith consults you as to who is liable for his injuries. How would you advise him?

Answer 315.

Williams and the chauffeur are the only ones liable.

"The owner of an automobile is not liable in an action for damages for injuries to or death of a third person caused by the negligence of an employe in the operation of an automobile unless it is proven that the employe, at the time, was engaged upon his employer's business and acting within the scope of his employment. The fact that the automobile was owned by the defendant and that the same was negligently operated by an employe, do not make a prima facie case of negligence against the owner, unless it appears that the employe was driving the automobile with authority, express or implied, of the owner." *Coal Co. vs. Rivoux*, 88 O. S., 18.

Question 316.

A contracts for goods in his own name with C, although he is in fact acting for B, an undisclosed principal. A becomes insolvent and C then discovers that he was agent for B. May C hold B on the contract?

## **BAR EXAMINATIONS**

### **Answer 316.**

C can hold B on the contract.

"If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made.

The rule is probably the outcome of a kind of common law equity, powerfully aided and extended by the fiction of the identity of principal and agent, and the doctrine of reciprocity or mutuality of contractual obligations." Huffcut on Agency, Chap. X, Sec. 120.

### **Question 317.**

A, an agent of the X Woolen Company of New York, is authorized to sell out its entire stock of woolen goods at a certain price set forth in a price list that is furnished him.

A finds a dealer, B, in Columbus, who will buy the entire stock at a slight reduction from the list price. A accordingly on behalf of the X Company, makes a contract for the entire stock, with B, who does not know that A is not authorized to sell at that price, and notifies the X Company of the same.

The X Company immediately and before B has changed his position, telegraphs B that it will not sell, because A's agreement to cut the price is unauthorized.

- (a) What are B's rights against the X Company?
- (b) What, if any, rights has B against A?

### **Answer 317:**

(a) B has a right of action against the X Company for nominal damages. Williston on Contracts, Sec. 1345.

"Compensation cannot be recovered for injuries which the injured party, by due and reasonable diligence after notice of the wrong, could have avoided. Such consequences are regarded as remote, the injured party's will having intervened as an independent cause." Hale on Damages, Sec. 30.

(b) B may have a right of action against A for breach of the warranty of authority.

"Where an agent knowingly, negligently or mistakenly holds himself out, either expressly or impliedly, as having authority to act for a principal in a particular transaction,

## OHIO SUPREME COURT

when in fact he has no such authority, he is liable to the third party who deals with him on the strength of such representation for any damage the latter may suffer in consequence of any change of his legal relations induced by the representation." Huffcut on Agency, Chap. XV, Sec. 183. (T.)

If the third person has brought an action against the principal and been defeated because of the want of authority of the agent, he may, in a subsequent action against the agent for breach of the warranty of authority, recover in addition to the usual damages, the costs of the action against the principal. Id., Sec. 183 (4).

"The liability of one contracting as agent without having in fact authority to do so, is founded upon his implied promise that he has authority to bind the principal." Trust Co. vs. Floyd, 47 O. S., 525.

# OHIO STATE BAR EXAMINATION

JUNE, 1920

## AGENCY

Question 318.

(a) Whose representative is an agent holding a conveyance of land in escrow?

(b) Whose agent is an insurance solicitor in filling out an application for fire insurance, the insurer or the insured.

Answer 318.

(a) The agent of the grantor.

The delivery by the releasor of an otherwise perfectly executed deed of release, to a known agent of the releasee is, in law, a delivery to the principal.

A deed may be delivered to a stranger as an escrow, which means a conditional delivery to the stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the grantee. Until the condition be performed and the deed delivered over, the estate does not pass but remains in the grantor. Generally an escrow takes effect from the second delivery, and is to be considered the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction.

The phrase "a stranger" used in this definition, or the phrase, "a third person" which in many of the books is used interchangeably with it, it seems to me can mean no more than this, a stranger to the deed, as not being a party to it; or, at most this—a person so free from any personal or legal identity with the parties to the instrument as to leave him free to discharge his duties as a depository to both parties without involving a breach of duty to either. *C. M. & Z. Ry. vs. Iliff*, 13 O. S., 235.

(b) By the provisions of Section 9586, General Code, a person who solicits insurance and procures the application therefor shall be held to be the agent of the company thereafter issuing a policy on such application, anything in the application or policy to the contrary notwithstanding. If a policy, written by one who is an agent within the meaning of the section referred to, is delivered and accepted, which by mutual mistake of the parties, insufficiently describes the place in which the property is located, the court will, when

## OHIO SUPREME COURT

the mistake is shown by clear and convincing proof, reform the policy so as to state the contract actually made. *Fire Ins. Co. vs. Machine Co.*, 96 O. S., 442.

### Question 319.

John Adams, as broker for Thomas Brown, holds \$10,000 of Brown's money to be used in the purchase of railroad stock. Adams purchases a renting property in Columbus and takes title in his own name. Without any knowledge of the interest of Brown, a bank in Zanesville loans money to Adams, and takes a mortgage on the above real estate.

(a) Can the bank enforce the mortgage?

(b) Can Brown compel a conveyance of the property to himself?

### Answer 319.

(a) The bank can enforce the mortgage. The equity of Brown, in the absence of notice of it to the bank, is of no avail as against the bank.

(b) Brown can compel a conveyance of the property to himself. Where a trustee or other fiduciary purchases property with trust funds and takes title in his own name, a trust will result by operation of law for the benefit of the trust estate as the trustee will be presumed to have intended that the purchase should inure to the benefit of the estate. Trust funds may in this way be followed into any property into which they have been invested or converted by the trustee; and this is constantly done by the courts for the benefit and redress of injured cestuis que trustent. *Bispham on Equity*, Par. 86.

### Question 320.

What exception to the rule in Ohio is there if any, that a principal may revoke the power of an agent?

### Answer 320.

When the power is coupled with an interest.

"A power of attorney to one to sell land at a certain price, and keep all he can get over that amount, is coupled with an interest, and cannot be revoked after a negotiation for a purchase is made." *Wheeler vs. Knaggs*, 8 O., 169; *1 Longs. Notes*, 421.

### Question 321.

Define (a) Special Agent; (b) General Agent; (c) Universal Agent.



**Answer 321:**

(a) A special agent is said to be one authorized to act for his principal in only a single, specific transaction, such act or transaction not being in the ordinary course of a trade or profession which he is following.

(b) A general agent is said to be (1) one authorized to act for his principal in all matters (universal agent) or in all matters connected with a particular trade or business; or in all matters of a particular nature, or (2) one whose business or profession it is to transact for any or all persons a particular kind of business, as a factor, broker, auctioneer, lawyer, etc.

(c) A universal agent is said to be one authorized to transact for his principal any and all business which can be done through a representative. Such agencies are theoretical rather than practical, and a universal agent, is at most, a "general agent" in the superlative degree. Huffcut on Agency, p. 19.

**Question 322.**

B authorized C to sell his (B's) home and is to receive all he can secure above \$5000 from the purchaser as his compensation. C finds a purchaser for \$6000 but B refuses to sell his property.

Has C a cause of action against B for services? If so, in what amount?

**Answer 322.**

C has a cause of action against B for services, and should recover \$1000 as his commission.

A verbal contract to pay a real estate agent all he could get on a sale of lands above a stated sum, is valid, and is not within the statute of frauds. Robinson vs. Hathaway, 2 Dec. Rep., 581.

**Question 323.**

Is a principal in Ohio ever liable for the tort of his agent? If so, in what cases?

**Answer 323.**

The general rule is, that as to third persons the principal is liable for the acts of his agent done within the general scope of his authority, and that such authority may be general, though limited to a particular business. Withers vs. Ewing, 40 O. S., 400; IV Longs. Notes, 34.

The liability of the defendant is based upon the wrongful and negligent acts of its servant. The defendant, how-

ever, is not liable unless the acts complained of were committed while the servant was acting within the scope of his employment. This is the test and the authorities agree upon this principle. *Lima Ry. Co. vs. Little*, 67 O. S., 91.

The owner of an automobile is not liable in an action for damages for injuries to or death of a third person caused by the negligence of an employee in the operation of the automobile, unless it is proven that the employee, at the time, was engaged upon his employer's business and acting within the scope of his employment.

The facts that the automobile was owned by the defendant and that the same was negligently operated by an employe do not make a prima facie case of negligence against the owner, unless it appears that the employe was driving the automobile with authority, express or implied, of the owner. *White Oak Coal Co. vs. Rivoux, Admx.*, 88 O. S., 18.

Question 324.

(a) Name three differences between an agent and a trustee.

(b) A employed B, who, under A's direction, was authorized to canvass a certain city for the sale of sewing machines, collect moneys payable therefor, and report results daily to A, for all of which he was to receive \$50 per week. Was B the agent or servant of A?

(c) Why?

Answer 324.

(a) 1. A trustee has title, an agent has not.

2. A trustee acts in his own name, an agent acts in the name of his principal.

3. Death does not revoke the power of the trustee, but death will revoke the authority of the agent unless it is coupled with an interest or with an obligation.

(b) B was the agent for A.

(c) Because in the contract of employment between A and B, the form of the contract authorizes B to do acts for A which would change A's legal relations.

However, in *Gravatt vs. State*, 25 O. S., 162, it is held that, in an indictment for embezzlement under these circumstances, designating the defendant as a "servant" is not reversible error.

Question 325.

(a) A, who knows that he is not agent for B, neverthe-

## BAR EXAMINATIONS

less enters into a contract with C to sell to him certain property belonging to B. C is ignorant of A's want of authority. Upon breach of the contract, can C recover from A?

(b) Suppose that A believes that he has authority from B, but is innocently mistaken, can C recover from A in case of breach?

(c) Suppose that A and C know that A is not agent for B, can C recover from A in case of breach?

**Answer 325.**

(a) C has a right to recover from A upon the theory of a breach of a warranty of authority as to his agency made by A.

(b) In this case A would be liable to C. It is not at all necessary to the liability of the agent that he should have acted in bad faith, although that fact may affect the form or the extent of his liability. Even where in good faith he believes he has authority to make the contract, but has not, he is nevertheless liable. *Mechem on Agency*, p. 103.

(c) In this case A the agent would not be liable. If the party supposed to be agent fully and thoroughly discloses to the other party all the circumstances connected with it, so that the other party can judge for himself whether the agent is authorized, the agent will not be liable. *Mechem on Agency*, p. 105.

**Question 326.**

A, who is a salesman for B received a letter from him:

"Dear Sir:—C owes me \$5,000 on account. Go to see him regarding this at once. You have full authority to act for me in the matter. Yours truly, B."

Upon demand made for the \$5,000 C offered goods of that value to A in payment.

Did A have authority to accept the goods?

**Answer No. 326.**

Where a foreign creditor of a debtor who was on the eve of bankruptcy, gave to his agent written authority to "see" the debtor "in regard to" the debt with "full authority to act for" the creditor in the matter, it was held that the agent was authorized to receive from the debtor personal property in satisfaction of the debt. *Oliver vs. Sterling*, 20 O. S., 391.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1920

### AGENCY

#### Question 327.

H began actions against C and D for commissions on an exchange of lands between C and D wherein H with the consent of C acted as the agent of both parties. D did not know that H was agent for C.

What are the rights of the parties?

#### Answer 327.

The agent cannot recover commission from either principal. Compensation cannot be recovered by an agent who acted for both parties from the principal who assented thereto, unless the other party also assented to the double agency. 40 O. S., 203.

#### Question 328.

Define the following:

- (a) Attorney in fact.
- (b) Factor.
- (c) Del credere agent.
- (d) Bill-broker.

#### Answer 328.

(a) A person to whom the authority of another, who is called the constituent, is by him lawfully delegated. He is called an attorney in fact. Bouvier's Law Dictionary.

(b) A factor is an agent whose business it is to receive and sell goods for a commission. He is often called a commission merchant.

(c) A factor who guarantees payment for the goods he sells, is said to be del credere agent.

(d) Bill and note brokers negotiate the purchase and sale of bills of exchange and promissory notes.

#### Question 329.

(a) A places money in the hands of his agent to wager on an election. The agent fails to do so, and converts it to his own use. Can A recover?

(b) State two exceptions to the general rule that a

## BAR EXAMINATIONS

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principal has power to revoke at any time the authority of his agent.

**Answer 329.**

(a) A can recover against the agent. While the courts will not enforce an illegal contract, between the parties, yet, if an agent of one of the principals has, in the prosecution of an illegal enterprise for his principal, received money or other property from his principal, he is bound to turn it over to him, and cannot save himself from liability therefore upon the ground of the illegality of the transaction. 39 O. S., 145.

(b) The principal has the power to revoke an agency at any time, unless where it is an agency coupled with an interest or with an obligation, or was given for a valuable consideration. Tiffany on Agency, p. 136.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### AGENCY

#### Question 330.

A, who lives in Columbus, Ohio, owes B who lives in Cincinnati, the sum of \$100. B sends the following telegram to A: "Please let me have settlement of amount due." A forwards the amount by American Railway Express Company and it is lost in transit. Can B maintain action against Express Company for amount? Why?

#### Answer 330.

B can maintain an action against the Express Company on the theory that the agreement made between A and the Express Company was an agreement made for his benefit; and the principle is well established in Ohio that if two persons make a contract for the benefit of a third party, the third party can sue on the contract.

#### Question 331.

An agent of an insurance company secured the application of B for a life insurance policy on his life. B paid the premium and the policy was to be delivered to him if he passed the physical examination, which examination he passed. The company forwarded the policy to A its agent with instruction to deliver same to B, which A did not do because B was sick at the time and later died. The policy was returned to the company at the request of the president. Can the beneficiary recover on the policy? Why?

#### Answer 331.

Where the agent of a life insurance company, having knowledge that a policy of insurance has been issued on an application made through him, visits the insured and collects the first premium, but finding the insured complaining of being ill delays delivery of the policy but retains the premium, and in the meantime typhoid fever develops and the insured dies therefrom, the company is liable on the policy on the principle of ratification and estoppel. *Prudential Insurance vs. Shively*, 17, O. C. C., N. S., 352.

#### Question 332.

Can a bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of the

## **BAR EXAMINATIONS**

bank take the stock without the knowledge and consent of the owner of the stock? Why?

**Answer 332.**

A bank official who gratuitously engages to find a purchaser for certain stock owned by a customer of the bank, thereby becomes the agent of the said customer and cannot thereafter himself become the purchaser of the said stock without full disclosure of that fact to his principal and the latter's assent thereto. *Telling vs. Sullivan*, 14 O. C. C., N. S., 1.

**Question 333.**

A, as the agent of B, is authorized by him to sell certain property for the sum of \$1,000. A sells the property for \$1,300. Is A entitled to the difference between what he sold it for and the amount he was authorized to sell it for? Why?

**Answer 333.**

An agent who is authorized to sell, cannot purchase for himself directly or indirectly, nor can he have any interest in the subject matter of the sale without his principal's consent. The law does not permit one who is an agent of a vendor to have any interest in a contract of sale, or earn any profit thereby outside of his regular compensation, unless it is done with knowledge and consent of his principal. *Page* vs. *Creasy*, 26 O. C. C., N. S., 113.

**Question 334.**

A, as principal, authorized B his agent, to sell his automobile for the sum of \$3,000.

Can B take the machine at that price? Why?

**Answer 334.**

It is a fundamental rule that an agent employed to sell cannot be a purchaser, unless he is known to his principal to be such; nor is the rule inapplicable or relaxed when the employment to sell is at a fixed price. *Peckham Iron vs. Harper*, 41 O. S., at 108.

**Question 335.**

A owns real estate which he wished to exchange for property belonging to B, and he employs C a real estate agent to make the exchange.

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B. owns real property which he wished to exchange for property belonging to A and employs C. to make the exchange.

C informed A of his employment by B, but C did not inform B of his employment by A.

The exchange is made.

Can C recover compensation for his services, and from whom?

Why?

The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, prima facie, inconsistent duties; and he cannot recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from either party. *Bell vs. McConnel*, 37 O. S., 396; Followed and approved in *Capener vs. Hogan*, 40 O. S., 203.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### AGENCY

Question 336.

- (a) Define Agency; how created; how terminated?
- (b) What is a Power of Attorney, and how created?
- (c) A, living in New York City, by power of attorney authorized B, living in Cincinnati, Ohio, to execute and sign a deed for him for property located in said city. Power of attorney was dated November 1, 1921, and was forwarded to Cincinnati, reaching there November 3rd. On November 2, 1921, A died suddenly in New York City. Was B authorized to sign and execute said deed on November 3, 1921?

Answer 336.

(a) Agency is a term signifying the legal relations established when one man is authorized to represent and act for another and does so represent and act for another. The one represented may be comprehensively termed the constituent, and the one representing him may be termed the representative. More specifically the constituent is called either a principal or a master, while the representative is called either an agent or a servant. Agency therefore divided itself into two main heads—the law of principal and agent, and the law of master and servant. Huffcut on Agency, p. 5.

The relation may be formed in any one of four ways:

1. By agreement.
2. By Ratification.
3. By Necessity.
4. By Estoppel. Huffcutt on Agency, p. 23, Sec. 9.

The relation may be terminated by—

- Expiration of time limited for the agency.
- Happening of a specific event, upon which contingency the agency was to terminate.
- When the purpose for which the agency was created is accomplished.
- Renunciation by the the principal.
- Renunciation by the agent.
- Where performance impossible, actually or legally.
- Death of principal or agent.
- Insanity of principal or agent.

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- Incapacitating illness of the agent.
- Bankruptcy of principal or agent.
- War between countries of principal and agent. Huffcutt on Agency, Chap. VI.

(b) An instrument authorizing a person to act as the agent or attorney of the person granting it. It is often called "letter of attorney."

It is created by the execution of this written instrument. Bouvier's Law Dictionary.

(c) B was not authorized.

"A power of attorney to convey lands is immediately revoked by the death of the principal, and deeds subsequently made by the attorney are void." McClasky vs. Barr, 50 Fed., 712.

Question 337.

A sent C a claim for collection against B amounting to \$1,000 with the following definite instructions "upon payment to you of said amount by B you may retain for your services a commission of ten per cent of amount paid."

C went to B and attempted to collect the bill but B refused to pay him. On the same day, however, B sent a check to A for the full amount of the claim. Before receiving the draft A telegraphed C to return the claim, which he refused to do. Upon learning that B paid the claim, C demanded his commission of ten per cent of the amount. A refused to pay. C brought suit. Could he recover? Give reasons.

Answer 337.

C is entitled to recover in the action.

"Where an attorney at law accepts an account for collection with an agreement that he is to have compensation, 25% of the amount collected, and the client, without sufficient cause, and without giving the attorney a reasonable time to make collection, wrongfully takes the account out of the hands of the attorney, a right of action for such breach of contract accrues at once in favor of the attorney, and upon establishing by proof that the account was a collectible claim, is entitled to recover damages."

The measure of damages is not what is finally collected on the claim by some one else, but is the rate of compensation fixed by the contract." Scheinesohn vs. Lemonek, 89 O. S., 424.

## Question 338.

A employed B, a real estate agent, to sell his real estate for the fixed price of \$10,000 agreeing to pay "the usual commission when the property is sold." B procured a purchaser who examined the property and paid down \$1,000 to B who gave him a receipt for the same. The purchaser promised to return in ten days to complete the sale and failed to return, and no sale of the property was made. A refused to pay the commission and B sued him for the full amount. Could B recover? Give reasons for answer.

## Answer 338.

B is not entitled to recover the commission.

"P a real estate agent was employed to sell a certain piece of real estate at a fixed price the owner agreeing 'to pay for services when the property was sold.' The contract between the principal and agent being in writing."

"P procured one who said he was willing to take the property at said price, and he paid the agent \$9.75 for which the agent gave a receipt, and turned the payment over to the vendors; but no written contract of purchase was entered into, nor was possession taken by the alleged purchaser, who afterwards refused to take the premises or complete the purchase by entering into an enforceable contract."

HELD:—That the condition in said contract of employment, "to pay for services when the property is sold," has not been complied with by the agent, and he is not entitled to recover commission. Pfanz vs. Humburg, et al., 82 O. S., 1.

## Question 339.

Jones being the manager of the United Gas and Electric Company, in Dayton, having full charge of the business, discovered a shortage in the returns of the electric meter reading and upon reading the meter of one Smith, discovered a discrepancy and sent him a bill for an alleged shortage. Smith refused to pay the bill and thereupon Jones went to the place of business of Smith and while engaged in an argument over the matter Jones called Smith an "electric current thief." A laborer employed by the company, discussing the matter with others one evening called Smith the same kind of a name. Smith thereupon filed two suits for slander against the United Gas & Electric Co., one for the slander uttered by Jones and the other for the slander uttered by the laborer employed by the company.

## OHIO SUPREME COURT

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Can Smith recover in said suits? Give reasons for answer.

**Answer 339.**

Smith is entitled to recover for the slander uttered by Jones.

Smith is not entitled to recover for the slander uttered by the laborer.

"A local managing agent of a corporation, to whom has been entrusted the control of its local business of distributing gas and electricity in a city and the adjustment and settlement of accounts arising from leakage on the premises of its consumers, is, in that connection, the alter ego of the company; and slanderous words spoken by him in the prosecution and furtherance of the business, which are not provoked and not due merely to personal malice, are within the scope of his employment, and his principal is liable therefore although it has neither authorized nor ratified the agent's act." *The Citizen's Gas & Electric Company vs. Black*, 95 O. S., 42.

But, manifestly, the same liability would not attach if a slander were uttered by a mere foreman of a right of way or by some subordinate agent of a private corporation, where it cannot be reasonably implied that the character of his duties might eventuate tortious conduct in course of performance. *Id.* at p. 48.

**Question 340.**

A employed B as his agent to purchase hogs for him in the open market. B made a contract with C to deliver one hundred hogs to A at the prevailing market price of the day of said purchase, C to deliver the hogs within ten days. C refused to deliver any of said hogs to A and upon being sued by A plead as a defense to the action that B was a minor, which fact was true, and thereby unable to make a contract.

Was this a good defense? Give reasons with answer.

**Answer 340.**

This was not a good defense.

"Inasmuch as it is the principal who is to be brought into contractual relations with third persons, it is obvious that the question of his capacity is more important than that of the agent. The agent acts in a representative capacity and exercises a derivative authority. A less degree of competency is therefore required in the agent than in the principal, and it is said that ANY PERSON may be an

## BAR EXAMINATIONS

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agent, EXCEPT a LUNATIC, IMBECILE or CHILD of TENDER YEARS. Hence infants, married women, slaves and aliens have been held competent to act as agents. Mechem on Agency, p. 27, Sec. 42.

Question 341.

B for a long time was the agent of A, making collections and attending to his other business. From time to time, as he obtained money he deposited the same in his own name in the Traders National Bank, he not having any other account of any other character in said bank. The bank failed. What were the rights and liabilities of the respective parties?

Answer 341.

The agent is liable to the principal for all the money collected.

The agent is a creditor of the bank to the amount of the deposit.

"If an agent deposits his principal's money in a bank in his own name or to his own account, he is the loser in case the bank fails." Huffcut on Agency, p. 113. Citing Massey vs. Banner, 1 Jac. & W., 241; William vs. Williams, 55 Wis., 300; Noltner vs. Dolan, 108 Ind., 500.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

**SURETYSHIP**

**Question 342.**

Is there any distinction between Surety and Guarantor? What is it? Define each.

**Answer 342.**

A Surety undertakes to pay the debt of another. A Guarantor undertakes to pay if the principal debtor does not or cannot. A Surety joins in the contract of the principal and becomes an original party with the principal. The Guarantor does not join in the contract of the principal but engages in an independent undertaking. A Surety promises to do the same thing which his principal undertakes; the Guarantor promises that his principal will perform the agreement and if he does not, then he, the Guarantor, will do it for him. Stearns on Suretyship, Sec. 6.

**Question 343.**

(a) What is the provision of the statute of frauds, in Ohio, relative to contracts of suretyship?

(b) Suppose the principal debtor has given to the creditor a mortgage or collateral security, and the surety has been compelled to pay the debt; has such surety any right to such mortgage or collateral security?

**Answer 343.**

(a) No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage of another person; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized. Gen. Code, 8621.

(b) He is entitled through the right of subrogation.

Subrogation is a doctrine of equity by which one who has been compelled to pay a debt which is the liability of another, is entitled to enforce the security for such debt given to the party to whom he has been compelled to make such payment. Ebright vs. Chapman, 11 O. N. P., N. S., 481.

**Question 344.**

(a) In the case a surety in this state takes indemnity from his principal, does or does not such indemnity inure to the benefit of the co-sureties?

## BAR EXAMINATIONS

(b) At common law was a contract of suretyship required to be in writing?

Question 344.

(a) Yes.

A surety deriving indemnity from the property of the principal obligor is charged with respect to it as trustee for his co-sureties. *Surety Co. vs. Boyle*, 65 O. S., 486.

(b) No. The Statute of Frauds was enacted 29 Car. II, and went into effect June 24, 1677.

Question 345.

(a) If the debt is due, and the surety discharges it by paying a less amount than is due, can he recover from the principal the full amount of the debt or only the amount the surety paid to discharge it and interest?

(b) Does the release by the creditor of the surety discharge the principal?

Answer 345.

(a) The surety can recover only the amount paid. His rights against the principal arise wholly upon a contract implied in law, that having paid money to the defendant's use, he is entitled to be refunded the amount paid. See *Elsa vs. Papple*, 12 O. N. P., N. S., 468.

(b) No.

Question 346.

(a) X by deed conveyed real estate to B; a recital in the deed is as follows:

"The premises hereby sold and conveyed are subject to a mortgage and note to the amount of \$5,000 with interest given by X to C which the grantee, B, assumes and agrees to pay as part of the consideration for said real estate herein described and hereby conveyed."

Upon the delivery of said deed by X to B and the acceptance thereof by B, as between X and B, what are their relation as to the above debt of \$5,000 to C?

(b) B failing to pay the mortgage and note to C, upon foreclosure of the mortgage the property did not sell for sufficient to pay C the amount due him. X was compelled to pay the balance. Can X recover from B this balance he was compelled to pay to C?

Answer 346.

(a) B is liable on the debt to C, because the contract between himself and X was a contract between two persons for the benefit of a third. *Emmit vs. Brophy*, 42 O. S., 82.

X is still liable to C, as a quasi-surety on the principle that one can assign his rights but not his obligations. X is not a surety for B, and will not be released even if C extends the time of payment of the mortgage for a definite period and for a valuable consideration. *University vs. Manning*, 65 O. S., 138.

(b) X can recover the balance from B.

In this case X must resort to an action on the implied promise of indemnity which arises in every instance where a surety pays the debt of his principal. *Poe vs. Dixon*, 60 O. S., 124.

Question 347.

(a) What notice, if any, is necessary to be given to the surety when the principal debtor does not pay at maturity?

(b) A client advises you that he has been sued upon a note upon which he is surety; that his principal is a co-defendant, and is responsible. What course would you pursue in behalf of such client?

Answer 347.

(a) None.

The contract of the surety is more burdensome to the promisor than the contract of the guarantor; the form of the latter's contract in some cases giving him the benefit of notice and the right to require the creditor to exercise diligence in pursuing the principal; advantages which the surety never has. *Stearns on Suretyship*, Sec. 6.

(b) When judgment is rendered in a court of record in this state, upon an instrument of writing in which two or more persons are jointly or severally bound, and it is made to appear to the court, by parol or other testimony, that one or more of the persons so bound signed it as surety or bail for his or their co-defendant, the clerk, in recording judgment thereon, must certify which of the defendants is principal debtor, and which is surety or bail. He shall issue execution on such judgment commanding the officer to cause the money to be made of the goods, chattels, lands and tenements, of the principal debtor, or, for want of sufficient property of his to make it, that he cause it to be made of the goods, chattels, lands and tenements of the surety or bail. The property, personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail is taken in execution. *Gen. Code*, 11713.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### SURETYSHIP

Question 348.

Define (a) Surety; (b) Guarantor.

Answer 348.

(a) A surety is a party who assumes with another the liability for the debt, default or miscarriage of the latter; the liability of both beginning at the same time.

(b) A guarantor is one who undertakes that, if another person fails to pay a certain debt, or perform a certain duty, he, the said guarantor, will do so; the liability in this case not attaching until such other person is in default. Childs on Suretyship and Guaranty.

Question 349.

May the relation of principal and surety be implied from the acts of parties, without an express agreement?

Answer 349.

Suretyship cannot be created without express agreement. Stearns on Suretyship, Sec. 23.

"The obligation of sureties cannot be extended by implication or enlarged construction of the terms of the contract entered into." Crane vs. Buckley, 203 U. S., 441.

"A surety has a right to stand upon the very terms of his contract the exact letter of his bond, and if he does not consent to any variance of it, and a variation is made, such variation operates to annul his contract and to discharge him from liability." Brewing Co. vs. Schultz, 68, O. S., 407.

"It is quite true that, in one sense, the contract of a surety is strictissimi juris, and it is not to be extended beyond the express terms in which it is expressed. The rule, however, is not a rule of the construction of a contract, but a rule of the application of the contract after the construction of it has been ascertained. Bouvier's Law Dictionary, Vol. 3, p. 3199.

"The common law rule that the contract of suretyship was to be construed very strictly in favor of the surety,

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does not apply in the case of compensated sureties. A contract of compensated suretyship should receive a reasonable construction in order to carry out the presumed intention of the parties as expressed by the language used." 4 Ohio, App. 477; 77 O. S., 90.

Question 350.

To what extent, if at all, will courts enforce parol contracts of suretyship? Give reasons.

Answer 350.

The obligation of the surety must be a collateral and not an original one; that is, there must be some other person who is primarily liable to the promisee, and if there is no such person the promise will be an original one and need not be in writing. Where the promise is to pay the debt of another, in consideration of the latter's being released, the promisor becomes primarily liable instead of collaterally, and the contract need not be in writing.

Where the main object of the promisor is to subserve some purpose of his own, and not the payment of another's debt, the promise is not within the statute, although its performance may have the effect of discharging the debt of another.

And when the promise is in effect to pay the debt of the promisor, it is not within the statute, although fulfillment will operate as a discharge of the debt of another.

Probably the most important question is to determine to whom credit was given. If credit was given wholly to the party who made the promise, he is held to be the principal debtor, and his contract is not within the statute; but if any credit was given to the party who received the goods, although the promisee relied principally upon the promisor, the contract is within the statute. The question as to whom credit was given is one of fact, to be determined upon all the circumstances. Childs on Suretyship, Sec. 84, et seq.

Question 351.

A, being surety for a debt of \$1,000 owed by B to C, paid to C \$750 on account of B's debt, the balance remaining unpaid, and demanded that he be subrogated to C's rights against the property of B to that proportionate extent. Was he entitled to this?

**Answer 351.**

A was not entitled to subrogation.

"The right of subrogation being an equitable one, it is consequently subject to the general qualification by which all equities are affected—namely, that it must not be enforced to the detriment of equal or superior equities existing in other parties; nor where its enforcement would operate to the prejudice or injury of the creditor; and cannot, therefore, be insisted upon until the creditor is fully paid and satisfied." *Bispham on Equity*, Sec. 338.

**Question 352.**

When several promissors are bound for a common burden, but by separate instruments, can any liability for contribution arise among them under these circumstances?

**Answer 352.**

"As the right of contribution does not depend upon the principles of contract for its enforcement, it is not necessary that the sureties be bound by the same instrument, or that they even know of each other's liability at the time they become bound; and it is held that they are co-sureties, even though they are bound by different instruments, at different times, and for different amounts." *Childs on Suretyship*, Sec. 162.

**Question 353.**

A, being arrested on a charge of grand larceny, gave bond before a magistrate for his appearance before the forthcoming term of the Court of Common Pleas to answer thereto.

The grand jury, however, indicted A for perjury and for no other offense.

A failed to appear in the Common Pleas Court.

Were his sureties liable on the bond?

**Answer 353.**

The sureties were not liable on the bond.

"All the defendant has to do is to comply with its letter, because a recognizance has no power beyond its letter." *State vs. Johnson*, 13 O., 176.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### SURETYSHIP

#### Question 354.

What things are necessary to constitute a contract of suretyship?

Name two common methods of answering for the performance of another's obligation.

#### Answer 354.

In a suretyship contract it is necessary that one party becomes legally liable for the payment of money or the performance of an act by another person.

Signing another's bond, or giving an obligation of guaranty.

#### Question 355.

The principal on a note and one of the sureties thereon were insolvent when a note became due. One of the two remaining sureties, who were solvent paid the note at maturity. What do you term the liability which the paying surety may enforce against his co-sureties and what part of the amount paid must the other solvent surety pay?

#### Answer 355.

This is the right to contribution.

The surety has the right to recover from his solvent co-sureties their ratable proportion of the sum which he has paid in excess of his share. Childs on Suretyship, Par. 163.

#### Question 356.

If a client, surety on a past due note, becomes fearful as to the ability of his principal to meet the obligation, what if anything can you do for your client's protection?

#### Answer 356.

The surety may require the creditor, by notice in writing, to commence an action forthwith against the principal debtor. Gen. Code, 12191.

The surety may maintain an action against his principal to compel him to discharge the debt or liability for which

## **BAR EXAMINATIONS**

the surety is bound after it becomes due. Gen. Code, 12206.

The surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist for which an order may be made for the arrest of a debtor, or for an attachment. Gen. Code, 12207.

**Question 357.**

(a) What is the Statute of Frauds as to answering for another's indebtedness?

(b) A threshing machine company sold one of its machines to A on credit, he having delivered to the selling agent a letter signed by the cashier of his bank, as cashier, which stated that "A is well to do financially, and I will vouch for his having always taken care of his indebtedness." "He has enough money now on deposit in this bank to pay for a threshing machine."

A defaulted, insolvent, and the company sued the bank for the price of the machine, claiming guaranty under the letter. Who should prevail and why?

(c) If A had sold the machine to B and B had orally promised to pay the price thereof to the company could the company enforce the promise of B to A? Reason for your answer.

**Answer 357.**

(a) No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage of another person; unless the agreement upon which such action is brought, or some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." Gen. Code, 8621.

(b) The bank should prevail. There was no promise made by them to answer for the debt, default or miscarriage of another.

(c) The company could enforce the promise made by B to A. Because the promise made by B is to pay his own debt, and the company could recover on the promise made by B to A for its benefit.

**Question 358.**

A, making a loan from B, brought to the latter his note with two sureties thereon. The note was payable in one year and stipulated "With interest at the rate of 7%."—B

## OHIO SUPREME COURT

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stated to A that he wanted the words "payable annually" inserted after the interest rate. Thereupon A in B's presence, added the words as B desired.

If B sues on the note, is there any defense because of A's interlineation?

What is it, who may urge it, and why?

**Answer 358.**

There is a defense, to-wit: That of a material alteration, and the sureties may urge it.

When a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided except as against a party who himself has made, authorized or assented to the alteration, and subsequent indorsers. Gen. Code, 8229.

The words "payable annually" inserted after the interest rate constitute a material alteration. Boalt vs. Brown, 13 O. S., 364; 11 Longs. 613.

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**DECEMBER, 1920**

**SURETYSHIP**

**Question 359.**

Define contract of suretyship.

**Answer 359.**

Suretyship is defined by statute as being a special contract whereby one agrees to answer for the debt, default or miscarriage of another.

Suretyship is the legal relation which arises when one party assumes with another the liability for the debt, default or miscarriage of the latter; the liability of both beginning at the same time. Childs on Suretyship.

**Question 360.**

How may a surety under the laws of Ohio require a creditor to proceed against a principal after the cause of action accrues?

**Answer 360.**

A surety's rights under these circumstances are prescribed by General Code, 12191. A surety may require his creditor, if right of action has accrued on the debt, by a notice in writing, to commence an action on such instrument forthwith against the principal debtor. Unless the creditor commences such action within a reasonable time thereafter, and proceeds with due diligence, in the ordinary course of the law, to recover judgment against the principal debtor, for the money or other valuable thing due thereby, and to make by execution the amount thereof, the creditor, or the assignee of such instrument, so failing to comply with the requisition of such surety, thereby shall forfeit his right which he would otherwise had to demand and receive of him the surety the amount due thereon.

**Question 361.**

When, if at all, may a surety maintain an action against his principal to obtain an indemnity against the debt or liability for which he is bound before it is due?

**Answer 361.**

The rights of the surety under these circumstances are prescribed by General Code, 12207.

A surety may maintain an action against his principal to obtain indemnity against the debt or liability for he is bound, before it is due, whenever any of the grounds exist upon which an order may be made for the arrest of a debtor, or for an attachment.

Question 362.

Where the grantee of a parcel of real estate as part of the purchase price thereof assumes to pay a debt secured thereon by a mortgage, the grantor being also personally bound for the payment, what relation as to suretyship, if any, does such assumption establish between the grantor and the grantee?

Answer 362.

Under these circumstances there is a relation of quasi suretyship established. The original promisor is not a technical surety, and he would not be released by an extension for a definite time for a valuable consideration as a surety would. *Teeters vs. Lamborn*, 43 O. S., 144; *University vs. Manning*, 65 O. S., 138.

Question 363.

B is surety on the bond of A as guardian of C, a minor. When C becomes of age A is solvent but does not make a settlement with his ward for some time thereafter. When C demands a settlement from his guardian, the guardian has become insolvent. Does the delay of C in demanding a settlement when he becomes of age release the surety?

Answer 363.

The delay of C has not prejudiced his rights as against his surety. *Wrights Reports*, page 667; 26 O. S., 525; 13 Ohio, 84.

Question 364.

Where from his own funds, a surety furnishes to his principal money to be applied to pay the debt of the principal for which the surety is bound, and the money is thus applied by the principal, what right, if any, has the surety to additional security held by the creditor received from the principal debtor?

Answer 364.

The surety has no right to the original security held by the creditors. In order to be entitled to subrogation, the creditor must have had his claim fully satisfied, and the surety claiming subrogation must have paid it. *Kyner vs. Kyner*, 61 Watts (Pa. 221.)



## OHIO STATE BAR EXAMINATION

JUNE, 1921

### SURETYSHIP

#### Question 365.

- (a) On what grounds may a surety defend against a note when suit is brought by an innocent holder for value?
- (b) What is meant by "subrogation" in suretyship?

#### Answer 365.

(a) The defenses which may be interposed by the principal are of two classes:

First, those which are inherent to the debt or obligation, called defenses in rem, such as fraud, duress, want or failure of consideration, and the like.

Second, those which are personal to the debtor, called defenses in personam, such as the insolvency or infancy of the debtor.

Those of the first class may be pleaded by the surety, as they entirely avoid the obligation; but those of the latter class cannot. Childs on Suretyship, Par. 130, 131. See Question and Answer No. 280.

(b) Subrogation is a doctrine of equity by which one who has been compelled to pay a debt which is the liability of another, is entitled to enforce the security for such debt given to the party to whom he has been compelled to make such payment. Ebright vs. Chapman, 11 O. N. P., N. S., 481; 21 O. D., N. P., 96.

#### Question 366.

James Brown, a minor seventeen years of age, purchases an automobile of the City Motor Company, and executes a note with Frank Jones as surety for the payment of the same six months after date. Brown defaults in the payment and suit is brought to recover judgment on the note.

(a) Will the court render judgment against the principal James Brown where the defense of infancy is made?

(b) Will the court in such case render judgment against Frank Jones as surety where his only defense is the infancy of James Brown?

#### Answer 366.

(a) No. Because this contract of the infant is voidable.

(b) Yes. Because the defense of infancy is personal to the infant.

**Question 367.**

Suppose A as principal and B as surety execute a note to C. Name the ways in which B may be released from the payment of this note other than payment by A.

**Answer 367.**

(1) Giving time to the principal debtor, by the creditor, without the consent of the surety. The extension must be for a definite time and for a valuable consideration.

(2) The alteration of the contract so as to affect the liability of the surety in any way.

(3) The misrepresentation, concealment or fraud of the creditor, or of the principal debtor with the creditor's knowledge.

(4) The relinquishment or negligent loss by the creditor of securities for the debt.

(5) Failure of the creditor to perform conditions.

(6) Tender of the debt by the principal. Childs on Suretyship, Par. 107; 108; 128-133.

**Question 368.**

A purchases a threshing machine and executes a note in payment for the same calling for \$1,000. B signs as surety on the note.

On being advised by the Threshing Machine Company that two sureties are required on the note, B calls upon C, his friend, and requests him to become co-surety with him, and they verbally agree that he, B, will protect C and save him from any loss by reason of his signing said note.

A fails to pay the note and suit is brought and B and C are compelled to pay the same.

Can C recover from B the amount he was compelled to pay, on the verbal promise of B?

**Answer 368.**

C is entitled to recover from B on his verbal promise.

(1) A promise of indemnity by one not a party to an obligation to induce another to become surety thereon, being a promise to answer for the default of another person, if not in writing, is void under the statute of frauds.

(2) But if a surety on an obligation, upon his promise of indemnity, procures another to become surety with him on the same instrument, the promise is not within the statute, for the indemnity promised is to secure his own default.

(3) A surety on an administration bond, by his agreement of indemnity, induced another to sign the same bond

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as surety with him. **HELD:** that the agreement, though not in writing, was valid and binding as between the parties to the agreement. *Ferrell vs. Maxwell*, 28 O. S., 383; 111 Longs. Notes, 413.

Question 369.

Suppose there are three sureties on a joint and several promissory note and it was found that one of the sureties was hopelessly insolvent.

One of the solvent sureties pays the note.

What proportion of the amount he paid can he recover from the remaining solvent co-surety?

Answer 369.

Plaintiff is entitled to recover one-half the amount so paid from the remaining solvent co-surety.

"The rights of contribution and subrogation are both founded upon equity rather than upon contract." *Hartwell vs. Smith*, 15 O. S., 200; 11 Longs. Notes, 720.

In equity the surety who has paid the debt can recover from each of the solvent co-sureties a pro rata amount of the sum paid by him, based upon the number of solvent sureties, and excluding the insolvent ones. *Childs on Suretyship*, Par. 171.

Question 370.

In Ohio may a surety be released from answering for the debt of another which is not in writing? Why?

Answer 370.

If this question means that the principal contract is oral, the surety will not be released if the contract of suretyship is in writing, as the statute of frauds would then be complied with. If the question means that the contract of the surety is not in writing, then the surety cannot be held.

"No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default or miscarriage of another person; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." Gen. Code, 8621.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

### **SURETYSHIP**

#### **Question 371.**

Brown is indebted to Adams on a note in the sum of \$1,000 with Miller as surety on the note. Miller is indebted to Brown for a book account in a similar amount for necessities furnished by Brown to Miller for himself and his family. One month before Brown's note falls due, Adams meets Miller and Brown at Brown's store, and it is then orally agreed between all three that Miller shall pay to Adams within three days the amount of the note for Brown, and that Adams shall forthwith return the note to Brown. Adams returns the note to Brown in accordance with the oral agreement, and Brown destroys it. Miller refuses to pay and Adams consults you as to what, if any, remedy he has against Miller. How would you advise him? Why?

#### **Answer 371.**

I would advise Adams to sue Miller on his oral promise to pay to Adams the amount of the note for Brown.

The transaction is a novation as to the prior dealings between the parties.

Miller has made the debt of Brown his own, and his promise to pay it is supported by the promise of Adams to return the note to Brown, which ends the obligation of Miller as surety on the note. The promise of Miller is a promise to pay his own debt, not the debt of another.

#### **Question 372.**

As cashier of the Columbus National Bank, Cabot was required to give a bond in the sum of \$5,000 with one surety, the bond being conditioned upon the faithful performance of his duties by Cabot. Martin signed the bond as surety with Cabot, the liability being joint and several. Later the bank required an additional \$5,000 bond from Cabot with two sureties, and Blake signed a similar bond as surety for Cabot as principal and with Martin as co-surety. Then Cabot defaulted and disappeared with \$4,000 of the bank's money. The bank sued Martin on the first bond and recovered from him the amount of the loss. Martin consults you as to his rights, if any, against Blake. How would you advise him, and why?

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### Answer 372.

Martin has a right to recover one fourth of the liability, to-wit: \$1,000.00 from Blake.

"Two sureties who are liable for a default on different bonds and in different amounts, are liable as co-sureties and in proportion to the respective amounts of their bonds." State ex. rel. vs. Bonding Co., 16 O. N. P., N. S., 497.

### Question 373.

On January 1, 1910, Smith as principal, and Brown as surety, gave their joint promissory note to Johnson for the payment of \$1,000 two years after date. In February, 1912, Smith died, and upon prompt presentation of the note for payment, the administrator refused to allow it as a valid claim against the estate. In June, 1921, Johnson brings suit against Brown on the note. Brown answers that the claim being barred by lapse of time against the estate of the principal maker, it is therefore barred as against him as surety. Johnson demurs to the answer. Judgment for whom, and why?

### Answer 373.

The demurrer should be sustained and judgment rendered in favor of the plaintiff Johnson.

"Neglect to sue the debtor's administrator until limitation bars the claim, does not release the surety, and this is so even though the promise was joint in form." Moore vs. Gray, 26 O. S., 525; Ill Longs. Notes, 325.

### Question 374.

Jones, Black, Carter and Emerson, four co-sureties on a bond, are liable in the amount of \$8,000 by reason of the default of the principal. Jones is insolvent; Black is beyond the jurisdiction of the court; Carter and Emerson are solvent and available within the jurisdiction, and suit is brought against them. Emerson forthwith pays off the obligation. What right has he against Carter, and why: (a) at law (b) in equity?

### Answer 374.

(a) None. The rights of contribution and subrogation are both founded on equity rather than on contract. Hartwell vs. Smith, 15 O. S., 200.

No contribution could have been enforced at common law, and the relief given in equity was consequently based upon the general principle that no redress could be had elsewhere. Bispham on Equity, Sec. 329.

(b) In Equity Emerson has the right to recover one-half of the amount, which he has paid in an action for contribution against Carter.

"When any of the sureties are insolvent, the division is made among those who are solvent. Thus, when one of the three sureties has paid the whole debt, he is allowed a half from his co-surety if the third is insolvent." 25 O. S., 89.

If some of the sureties are absent from the jurisdiction, those absent will be excluded, and the entire burden distributed among the ones remaining. Stearns on Suretyship, p. 491.

Question 375.

\$2,000 was borrowed by Stoner from Thomas on a note secured by mortgage on Stoner's farm, and Matthews endorsed the note for Stoner's accommodation. Stoner thereupon obtained by fraud from Thomas, and without the knowledge of Matthews', a release of the mortgage on the farm and sold it to a bona fide purchaser. The note is not paid at maturity, and Thomas brings suit against Matthews. For whom should judgment be rendered, and why?

Answer 375.

The Plaintiff, Thomas.

"Although the vendor in a contract to convey land in twelve months who has a surety on the purchase notes, makes a conveyance at the required time, when he would have had the right to retain the title as security, the surety is not released, for this right is not collateral security. This is also true even though he took a purchase money mortgage, but was induced to withhold it from record, whereby it was lost." Coombs vs. Parker, 17 O., 289.

The general rule is contra. See Williston on Contracts, Sec. 1233, p. 2237, where Coombs v. Parker is cited.

Question 376.

Thompson borrows \$1,000 from Atkins on a note secured by a mortgage on Thompson's farm. Thompson sells the mortgaged farm to Bridwell, who, as part consideration of the purchase price, assumes and agrees with his vendor, Thompson, to pay the mortgage note, of which agreement Atkins has notice. Later, without the knowledge of Thompson, Atkins agrees with Bridwell for good consideration to extend the time for payment of that debt. After such exten-

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sion Thompson refused to pay the note, and Atkins brings suit on it against him. Thompson's answer sets up as a defense the mere fact that Atkins had given Bridwell additional time for payment of the note without his, Thompson's, knowledge or consent. Upon demurrer to that answer, for whom should judgment be rendered, and why?

**Answer 376.**

**Judgment for plaintiff. Demurrer to answer should be sustained.**

"An answer in an action by the payee of a promissory note against the maker to recover a balance due after applying the proceeds of sale of mortgaged premises, which alleges the sale and conveyance by the mortgagor, after the execution of the note and mortgage, to purchasers who agree, as part of the consideration, to assume and pay the mortgage debt, and that the payee of the note was duly advised of the sale and the agreement of the purchasers to pay the note, consented thereto and received interest on the note from the purchasers from time to time for seven years, and that, without the knowledge and consent of the defendants, plaintiff, for a valuable consideration, agreed with the purchasers to extend the payment of the note after maturity thereof, and did so extend it, does not state facts sufficient to establish that the payee agreed to accept such purchasers as principal debtors and to release the makers from obligation save as sureties, and does not state a defense." *Denison University vs. Manning, et al.*, 65 O. S., 138.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

**DOMESTIC RELATIONS**

**Question 377.**

(a) When if ever, is a wife liable for the support of her husband and their children?

(b) What is the liability of husband or wife, as such, for the acts of the other?

**Answer 377.**

(a) The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able. Gen. Code, Sec. 7997.

(b) Neither husband nor wife as such, is answerable for the acts of the other. Gen. Code, 8002.

**Question 378.**

(a) When husband and wife are living separate and apart from each other, or are divorced, and the question is brought before a court of competent jurisdiction in this state, has either any priority of right to the care, custody and control of their children?

(b) What should be the court's prime consideration in determining the custody of children?

**Answer 378.**

(a) They stand upon an equality as to the care, custody and control of such offspring, so far as it relates to their being either the father or mother thereof. Gen. Code, 8032.

(b) The best interests of the children. Gen. Code, 8033.

**Question 379.**

A child is born to unmarried parents who afterward intermarry while domiciled in the state where such marriage legitimizes the child. Subsequently parents and child move to a state whose laws do not provide for such legitimation. Will the child inherit from the father in the last mentioned state?



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**Answer 379.**

**Yes.** "As to issue born before the marriage, if by the law of the country where they are born they would be legitimized by the subsequent marriage of their parents, they will by such subsequent marriage (perhaps in any country, but at all events in the same country) become legitimate, so that this character of legitimacy will be recognized in every other country. If illegitimate there, then the same character will belong to them in any other country." Story—Conflict of Laws, Sec. 105. See also opinion in *Morris vs. Williams*, 39 O. S., 554.

**Question 380.**

Name eight causes for divorce.

**Answer 380.**

Courts of Common Pleas may grant divorces for the following causes:

1. That either party had a husband or wife living at the time of the marriage from which divorce is sought.
2. Wilful absence of either party from the other for three years.
3. Adultery.
4. Impotency.
5. Extreme cruelty.
6. Fraudulent contract.
7. Any gross neglect of duty.
8. Habitual drunkenness for three years.
9. The imprisonment of either party in a penitentiary under sentence thereto. The petition for divorce under this clause must be filed during the imprisonment of the adverse party.
10. The procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while they remain binding upon the other party. Gen. Code, 11979.

**Question 381.**

X, while insolvent, conveyed to Y, a feme sole, real property in consideration of her marriage to him. Y knew nothing of X's indebtedness. Subsequently X's creditors to whom he was indebted at the time of the marriage sued to have the conveyance set aside as in fraud of their rights.

Can they maintain their suit?

Answer 381.

No. The question as to marriage being a valuable consideration most commonly arises, not in the law of contracts, but in the law of conveyances fraudulent as against creditors, and here it is held that marriage is a valuable consideration and a reasonable marriage settlement made or promised in writing (to comply with the Statute of Frauds) cannot be attacked by the settlor's creditors. Williston on Contracts, Vol. 4, Sec. 110.

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**DECEMBER, 1919**

**DOMESTIC RELATIONS**

**Question 382.**

At common law (a) What right could a husband exercise concerning the personal property of his wife?

(b) What interest had he in her real estate?

**Answer 382.**

(a) He is entitled absolutely to her earnings and to her personalty in possession, without any act on his part, and on his death they pass to his personal representatives, except that her paraphernalia (that is, such articles of wearing apparel, personal ornament, or convenience as are suitable to her rank or condition) belongs to her on his death, if undisposed of by him during coverture. He is entitled to her choses in action if he reduces them to possession during coverture, but not otherwise. Tiffany, Sec. 48-50.

(b) In the wife's **CHATTELS REAL** he acquired a kind of joint tenancy with her. He could sell, assign, mortgage, or otherwise dispose of them during the coverture without her consent. They were liable for his debts, and if he survived her, they are his absolutely, subject, however, to her antenuptial debts. But if she survived him, and he had not disposed of them during his lifetime, she took them, and the husband could not dispose of them by will so as to defeat her right.

Where the wife was seized of **INTERESTS FOR LIFE**, he became seized of such estates in the right of his wife, whether for her own life or the life of another, and was entitled to all the rents and profits during coverture; but he could not dispose of them so as to affect her right to take them at his death. In estates held by the wife in **FEE SIMPLE**, he had a life estate during their joint lives, and was entitled to all the rents and profits; but he could not dispose of nor incumber the fee, which remained to her and her heirs. At common law, when a child was born to them, capable of inheriting the estate, he became tenant by the curtesy initiate, which became consummate upon the wife's death. Tiffany, Sec. 53, et seq.

**Question 383.**

What right of inheritance, and under what circumstances, has an illegitimate child—

- (a) From its mother?
- (b) From its father?

**Answer 383.**

(a) Bastards shall be capable of inheriting and transmitting inheritances from and to the mother, and from and to those from whom she may inherit, or to whom she may transmit inheritance, in like manner as if born in lawful wedlock. Gen. Code, 8590.

(b) When, by a woman, a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate. Gen. Code, 8591.

**Question 384.**

Where a husband died, intestate and without child, seized of real estate acquired by purchase, and his widow subsequently entered into written contract for the sale of this real estate, but died before the time stipulated therein for delivery of deed, had the next of kin of the deceased husband any interest in this real estate or its proceeds?

Give reasons briefly.

**Answer 384.**

One-half of the real estate or its proceeds would go to the brothers and sisters (if any), or their personal representatives.

"When the relict of a deceased husband or wife dies intestate and without issue, possessed of any real estate or personal property which came to such intestate from a former deceased husband or wife by deed of gift, devise or bequest, or under the provisions of General Code, 8574, then such estate, real and personal, shall pass to and vest in the children of such deceased husband or wife or the legal representatives of such children. If there are no children or their legal representatives living, then such estate, real and personal, shall pass and descend, one-half to the brothers and sisters of such intestate or their legal representatives, and one-half to the brothers and sisters of such deceased husband or wife, from which such personal or real estate came, or their personal representatives." Gen. Code, 8577 (R. S., 4162.)

## **BAR EXAMINATIONS**

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In construing G. C. 8577, the rights of the parties involved are to be determined by the legal title and their legal status, and not upon equitable principles. (Citing and following *Patterson vs. Lampson*, 45 O. S., 77, post.) *Digby vs. Digby*, 5 O. C. C., N. S., 130.

Under the statutes of descent and distribution, the course of descent of real estate is to be controlled by the legal title. *Patterson vs. Lampson*, 45 O. S., 77.

If the deceased husband did not leave brothers or sisters, or their legal representatives, then the estate would go to the brothers and sisters of the wife or their legal representatives, or the wife's other heirs under G. C., 8574. *Ellis vs. Ellis*, 3 O. C. C., 186.

Question 385.

X was appointed guardian of the person and estate of Y, a minor, by the Probate Court of Franklin County, in which county they both lived. Soon afterwards Y went to reside for an indefinite time in Lorain county. In which county was the domicile of Y?

Answer 385.

In Franklin county.

"When necessary the probate court in each county shall appoint guardians of minors resident in such county." Gen. Code, 10915.

A minor cannot himself change his domicile, and as the residence of a minor is determined by the domicile of a parent or some person standing in the relation of a parent to him, the word "resident" as used in R. S., 6254 (G. C., 10915) means "domicile." In re Guardianship of James Edward Murray, 4 O. N. P., N. S., 233. Affirmed in 8 O. C. C., N. S., 498.

Question 386.

A married woman, having one child living, made a will devising her entire estate to her husband, and provided therein that no child that might thereafter be born to them should have any share of her estate. Two years later she had another child, and thereafter she died, survived by her husband and both children. On the probate of her will, what were the respective rights of

- (a) Her husband?
- (b) The older child?
- (c) The younger child?

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**Answer 386.**

- (a) Undivided one-half interest.
- (b) Nothing.
- (c) Undivided one-half interest.

Where a testatrix having a child living, devises all her estates to a third person (in this case, her husband) without making provision in her will for an afterborn child, such afterborn child, if it survive the testatrix, by virtue of R. S., 5961 (G. C., 10563) will inherit from the mother as her heir at law as if she died intestate, notwithstanding that by clear and explicit language in the will, such testatrix undertakes to disinherit such afterborn child. *Insurance Co. vs. Lushey*, 66 O. S., 233.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### DOMESTIC RELATIONS

#### Question 387.

When a mortgage on the husband's real estate is foreclosed, has the wife any interest in the said premises? If so, how is her interest determined? If not, why not?

#### Answer 387.

Upon a judicial sale of premises to satisfy a mortgage which the wife joined in, she may have her contingent right of dower in the entire proceeds ascertained, and the husband's entire interest must be exhausted before her interest can be resorted to. *Mendel vs. McClave*, 46 O. S., 407.

Contingent dower during the husband's life is property of substantial value reasonably ascertainable from mortality tables, aided by evidence of the health and vigor of the husband and wife. *Id.*

#### Question 388.

What actions, if any, may be brought by or against a husband or wife who claims a common law marriage?

#### Answer 388.

Marriage in Ohio may be ceremonial or by mere agreement and cohabitation. An agreement between a man and a woman, believing that they are marriageable by law, to become husband and wife, entered into in good faith, with continued cohabitation in that relation and the treatment of each other, not only between themselves but in the community, as husband and wife, establishes that relationship, and they are as legally married as though they had been married by official ceremony, and by virtue of a license or the publication of bans. *Mieritz vs. Insurance Co.*, 8 O. N. P., 422; 11 O. D., N. P., 759.

Therefore, actions for divorce, alimony, dower, custody of children or prosecutions for bigamy can be based on this relation.

#### Question 389.

Mrs. B.'s husband deserted her but did not leave the state in which they had resided. Mrs. B. then removed to

## OHIO SUPREME COURT

this state, established a residence here and brought an action for divorce and alimony. Has the court jurisdiction:

(a) To grant a divorce? Why?

(b) To grant alimony? Why?

**Answer 389.**

(a) A wife justified in leaving her husband may acquire a resident in Ohio, entitling her to a divorce although married in another state and living there before separation. *Chache vs. Chache*, 30 O. C. A., 481.

General Code, 11982—When a wife files a petition for a divorce, or for alimony, the residence of her husband shall not be so construed as to preclude her from the provisions of this (the divorce) chapter.

(b) Where there is no personal service in a divorce case against a non-resident, a judgment in personam for alimony is void for want of jurisdiction, and its enforcement against property in this state will be enjoined. *Massey v. Stimmel*, 5 O. N. P., 29.

**Question 390.**

(a) A, a minor, is sued for breach of promise and pleads infancy. Is this a good defense? Why?

(b) A is also sued on an account and pleads infancy. Is this a good defense? Why?

(c) B is sued on a note executed by him during his minority. He pleads this fact as his defense. Should judgment be rendered against him? Give reason.

**Answer 390.**

(a) A contract to marry, made by an infant, stands upon the same footing as respects his right to repudiate it, as any other executory contract that may be avoided by him. The case comes within the general rule that the contract of an infant is voidable at his election. *Rush vs. Wick*, 31 O. S., 521; III Longs. Notes, 602.

(b) Contracts by minors are voidable, and may be disaffirmed by the minor at any time up to and before and at the time of reaching majority. *Foredyoe v. Easthope*, 8 O. N. P., 585.

In a suit against an infant on his express contract for necessities, recovery can only be had for the fair value of the executed part of the contract. *Text Book Co. v. Alber-ton*, 10 O. C. C., N. S., 583.

(c) On a note made by an infant and then endorsed by his father, coming into the hands of an innocent holder,



## BAR EXAMINATIONS

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no mention of non-age being made, the infant cannot be held, though his silence was fraudulent, but the endorser can be held without notice as upon an original undertaking. *Shurragar vs. Conklin*, 3 Dec. Rep., 350.

Question 391.

A husband and wife living together agreed in writing, that for a stipulated sum, evidenced by promissory notes, given by the husband to the wife, the latter would release all her inchoate dower in all of her husband's real estate. The contract having been duly executed, five promissory notes were delivered to the wife. Upon the death of the wife, one of the said notes remained due and unpaid and her executor commenced an action to enforce payment. Should there be a recovery? Why?

Answer 391.

There can be no recovery. Sec. 8000 of the Gen. Code is a limitation imposed on the right of the husband and wife to contract between themselves, in that they may not "alter their legal relations" except by the method and to the extent therein stated. *Dubois vs. Coen*, Exr., 100 O. S., 17.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**DOMESTIC RELATIONS**

**Question 392.**

**What are the Domestic Relations?**

**Answer 392.**

1. Husband and wife.
2. Parent and child.
3. Guardian and ward.
4. Master and servant.

**Question 393.**

(a) A is the guardian of the person and estate of B, a female. B with the consent of A is married at the age of 17 years. Does the marriage of B terminate the guardianship of both the person and estate of B?

(b) Under what circumstances and to what extent should a wife assist in the support of her husband?

**Answer 393.**

(a) The marriage of B terminates the guardianship of the person but not of the estate. Gen. Code, 10929.

(b) General Code, 7997, provides that the husband must support himself, his wife and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able.

**Question 394.**

(a) A, while the owner of real estate, enters into an agreement to marry B. After the agreement with B to marry her, but before the marriage, A, without the knowledge of B, by deed duly executed and delivered, conveys his real estate to his children by a former marriage, the consideration for such conveyance being love and affection. The deed for said conveyance is not recorded until after the marriage of A and B. Some years thereafter, A died. Is the wife entitled to dower in the real estate so conveyed as aforesaid? Why?

(b) Can a husband and wife by contract alter their marital relations?

**Answer 394.**

(a) The wife is entitled to dower in the real estate

## **BAR EXAMINATIONS**

conveyed, because the conveyance was without consideration and is a fraud on her marital rights.

(b) General Code 8000. A husband and wife cannot by any contract with each other alter their legal relations, except that they may agree to an immediate separation, and make provision for the support of either of them and their children during the separation.

Question 395.

(a) Husband and wife enter into an agreement to separate, the husband paying the wife a fixed sum of money for the support of their minor children. The wife fails in her contract to support the minor children according to said agreement. Can the husband be compelled to support his said children?

(b) A husband orders repairs on his wife's property by a carpenter who believes him to be the owner, does the work, and in settlement takes the husband's note. The wife knew of the order, of the work being commenced and completed. Is she in any way liable on the contract?

Answer 395.

(a) A husband will be liable criminally for failure to support his children under these circumstances. The criminal prosecution is based on a duty owing to the public and not on any duty owed to the wife. 56 O. S., 235.

(b) The wife is liable by estoppel.

Question 396.

(a) A and B are legally married in the State of Kentucky, live together ten years, to their union a child is born. A abandons his wife B, removes to Ohio, procures a marriage license and marries C. A and C live together as husband and wife, and to this union a child is born. A died intestate owning real estate in Ohio. Is the child born of the union of A and C legitimate, and will it inherit from A?

(b) What are the duties of a guardian of a minor?

(c) What is a testamentary guardian?

Answer 396.

(a) General Code, 8591. When, by a woman, a man has one or more children, and afterwards intermarries with her, such issue if acknowledged by him as his child or children, will be legitimate. The issue of parents whose marriage is null in law, shall nevertheless be legitimate.

Under this section children born of a bigamous marriage,

their mother not knowing that their father was married, before said second marriage, are deemed legitimate so that they may inherit from their father. *Wright vs. Love*, 12 O. S., 619.

(b) The duties of a guardian of a minor are defined in General Code, 10934 and General Code, 10933. Briefly stated they are as follows:

1. To make out an inventory within three months of the estate of his ward.
2. To manage the estate for the best interests of the ward.
3. To file a statement under oath of the receipts and expenditures, verified by vouchers or proof from time to time, as to the investment and expenditures of the estate of the ward.
4. At the expiration of the trust to fully account for and pay over to the proper person all of the estate of the ward.
5. To pay all the just debts due from the said ward out of the estate in his hand and collect all debts due to the ward.
6. When the ward has no father or one who is unable or fails to educate the ward, his guardian shall provide such education for him as the amount of his estate may justify.
7. To lend or invest the money of his ward in notes or bonds secured by first mortgage on real estate of at least double the value of the money loaned or invested.
8. To settle and adjust when necessary or desirable, the assets which he may receive, in kind, from an executor or administrator as may be most advantageous to his ward.
9. To obey all orders and judgments of the proper courts affecting his guardianship.

(c) Testamentary guardians are provided for in General Code, 10931 and 10930. The substance of these sections is that a father, or if the father be dead or gone to parts unknown, a mother, by last will in writing, may appoint a guardian or guardians, for any of his or her children; when a guardian has been appointed by a will, by a father or mother of the child, he shall be entitled to a preference in appointment over all others without reference to his place of residence, or the choice of said minor. His appointment, duties, powers and liabilities in all other respects shall be governed by the law regulating guardians not appointed by will, except as provided in this section.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1921**

**DOMESTIC RELATIONS**

**Question 397.**

(a) In Ohio, what rights or privileges, if any, are conferred upon the husband that are not conferred upon the wife?

(b) Is the wife ever required to assist in the support of her husband and children? If so, when?

**Answer 397.**

(a) The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto. Gen. Code, 7996.

(b) The husband must support himself, his wife, and his minor children out of his property or by his labor.

IF HE IS UNABLE TO DO SO, the wife must assist him so far as she is able. Gen. Code, 7997.

**Question 398.**

B neglected to make adequate provision for his wife's support. A, in good faith, supplied her with necessities for her support. Can A recover the reasonable value thereof from B? Why?

**Answer 398.**

A is entitled to recover from B.

If the husband neglects to make adequate provision for the support of his wife, any other person, in good faith, may supply her with necessities for her support, and recover the reasonable value thereof from the husband. Gen. Code, 8003.

**Question 399.**

A father lived with his son as a member of the latter's family, and was supported by his son. After the father's death the son claimed compensation for supporting him. Is the son entitled to recover? Why?

**Answer 399.**

The son is not entitled to recover, in the absence of an express contract.

In an action by a daughter, on a claim for boarding and lodging her deceased mother, the court is compelled to charge the jury under the rule in *Sage vs. Hinkle*, 67 O. S., 256, that the contract between the mother and daughter must be established by clear and unequivocal proof. *Bolsinger Admr. vs. Halliday*, 22 O. C. C., N. S., 289.

**Question 400.**

If an adult son negligently operates an automobile belonging to his father, and when using such automobile for his own individual and exclusive purpose, injures a pedestrian, is the owner of the automobile liable, in Ohio, for injuries sustained if it is shown that the automobile was purchased for the use of the family and the son was living at home as a member of the family? Why?

**Answer 400.**

A charge to the effect that a father would be liable for the acts of his son, under the circumstances outlined in this question, has been held to be erroneous by the Supreme Court of Ohio.

The father is not liable merely because of the relation, for the tort of his child, whether the same was negligent or wilful. He is liable only on the same grounds that he would be liable for the wrong of any other person, that he directed or ratified the act, or took the benefit of it, or that the child at the time was acting as his servant. *Elms vs. Flick*, 100 O. S., 186.

**Question 401.**

B, whose business is supplying motor vehicles for funerals, furnished upon the order of an undertaker four limousines, together with drivers, to be used at a funeral which such undertaker was conducting.

The liveryman owned the limousines, hired and paid the drivers, and he alone had power to discharge them.

The undertaker directed the drivers where to go, whom to take in the different machines, gave them their positions in the funeral procession, and, after the funeral services, directed them to take the passengers home, without designating any direction or way to go.

While taking his passengers home one of the drivers struck and injured G.

Neither the undertaker, nor anyone representing him, was with the machine which caused the injury, and there was nothing to show that he did anything to bring about the negligent act.

Is B liable? Why?

**Answer 401.**

B is liable. The driver remained the general servant of the liveryman throughout the transaction and he is responsible for the negligence of such driver. *Gechi, by etc. vs. Bolte*, 31 O. C. A., 506; O. L. R., Mar. 14, 1921.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### DOMESTIC RELATIONS

Question 402.

If a wife is divorced in Ohio for her husband's aggression, would she be entitled to dower in the real estate of her divorced husband of which he was seized during their coverture if she marries again during the life time of her divorced husband?

Answer 402.

The wife would be entitled to dower.

"A wife who procures a decree of divorce from her husband because of his aggression retains her right of dower in any real estate which he may own not granted to her as alimony; and where an action is brought for the partition of property in which he holds an undivided interest, his former wife may ask by answer and cross-petition for an assignment to her of her inchoate contingent right of dower in her said former husband's share of said property." *Hand vs. Kibler, Guardian, 15 O. C. C., N. S., 360.*

"*Hand vs. Kibler, Guardian, supra* was reversed in 88. O. S., 533, on the authority of *Weaver vs. Gregg, 6 O. S., 547*, for the reason that the holding of the Supreme Court in *Weaver vs. Gregg* was that a decree in partition will divest the spouse of a parcener of the inchoate right of dower. This however does not affect the answer as to the dower rights."

Question 403.

A wife brings suit for divorce and alimony in Franklin county, Ohio, against her husband who had abandoned her and who was living somewhere unknown to the plaintiff in the State of Illinois. Service of summons was made in the usual manner by publication. Can the court enter a decree which may be enforced, ordering the husband to pay alimony? Give reason for your answer.

Answer 403.

The court has no jurisdiction to order the husband to pay alimony.

"In a divorce proceeding, alimony cannot be awarded where the domicile of the defendant is in another state and

service of process is only obtained by publication, except where he appear and submit himself to the jurisdiction of the court; and this is so although the defendant has property within the state." *Massey vs. Stimmel*, 15 O. C. C., 439.

Question 404.

In a controversy over the custody of a minor child by the father and mother who are living apart:

(a) What is the statutory rule and what is the rule followed by the courts in Ohio?

(b) What is the real governing factor?

Answer 404.

(a) When husband and wife are living separate and apart from each other, or are divorced and the question as to the care, custody and control of the offspring of their marriage is brought before a court of competent jurisdiction in this state, they shall stand upon an equality as to the care, custody and control of such offspring, so far as it relates to their being either father or mother thereof. Ohio Gen. Code, 8032.

The rule followed by the courts in Ohio is generally that where the child is of tender years the custody will be awarded to the mother, providing she be a proper person, and an order made for the father to make payments for the support of the child with right of the father to see the child at intervals.

"Other things being equal, the custody of a little girl of tender years should be awarded to her mother, but where the mother shows little affection for the child she will be given to the father." *Schultz vs. Schultz*, 18 O. C. C., N. S., 402.

(b) The real governing factor is that the court must take into account that which would be for the best interest of the child. See Gen. Code, 8033.

Question 405.

Mary, a daughter, twenty-two years of age and still living with her father, Thomas Jones, as a part of his family renders services such as housework and care of her father during his last illness. Her father dies leaving a will disposing of his property by giving it to Mary's brothers and sisters, who are married and not living in the father's family, and by the provision of his will, gives nothing to his daughter Mary. Can she recover from his estate for said



services rendered her father in his life time? If so, why? If not, why not?

**Answer 405.**

The daughter cannot recover against the father's estate unless she would be able to prove an express contract to performed and be paid therefore.

"In an action to recover compensation for services when it appears that the plaintiff was a member of the family of the person for whom the services were rendered, no obligation to pay for the services will be implied, and the plaintiff cannot recover in such case unless it be established that there was an express contract upon one side to perform the services for compensation, and upon the other side to accept the services and pay for them." *Merrick vs. Ditzler*, 91 O. S., 256.

**Question 406.**

(a) What are the statutory restrictions in Ohio relative to entering the marriage relation, if any?

(b) What is the constitutional provision in the Ohio constitution, if any, relative to the granting of divorces?

**Answer 406.**

(a) Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. Male persons under the age of twenty-one years, and female persons under the age of eighteen years must first obtain the consent of their fathers, respectively, or in case of the death or incapacity of their fathers, then of their mothers or guardians. Ohio Gen. Code, 11181.

(b) The general assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred. Article 2. Sec. 32, Ohio Constitution.

**Question 407.**

(a) What are the statutory grounds for divorce in Ohio?

(b) Define Guardian ad Litem.

(c) Define Prochein Ami.

**Answer 407.**

(a) Courts of Common Pleas may grant divorces for the following causes:

1. That either party had a husband or wife living at the time of the marriage from which the divorce is sought;

2. Wilful absence of either party from the other for three years;

3. Adultery;

4. Impotency;

5. Extreme cruelty;

6. Fraudulent contract;

7. Any gross neglect of duty;

8. Habitual drunkenness for three years;

9. The imprisonment of either party in a penitentiary under sentence thereto. The petition for divorce under this clause must be filed during the imprisonment of the adverse party;

10. The procurement of a divorce without this state, by a husband or wife, by virtue of which the party who procured it is released from the obligations of the marriage, while they remain binding upon the other party. Ohio Gen. Code, Sec. 11979.

(b) A guardian appointed to represent the ward in legal proceedings to which the ward is a party defendant. The appointment of such is incident to the power of every court to try a case; and the power is then confined to the particular case at bar. Bouvier's Law Dictionary.

(c) Next friend.

One who, without being regularly appointed guardian, acts for the benefit of an infant, married woman, or other person not sui juris. Bouvier's Law Dictionary.

(In Ohio this is true only as to an infant.)

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### WILLS

#### Question 408.

Who in Ohio may make a will?

#### Answer 408.

A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed. Gen. Code, 10503.

#### Question 409.

(a) If patent ambiguities appear in a will is the same solved by the construction of the will or by evidence?

(b) Within what time after the probate of a will may the same be contested?

(c) By what authority does a person make valid will?

#### Answer 409.

(a) They must be solved by construction.

Parol evidence cannot be admitted to contradict or explain the contents of a will. *Painter vs. Painter*, 18 O., 247.

For to allow language to be varied or contradicted, or omissions supplied, or apparent ambiguities removed by parol testimony would in effect be the repeal of the law requiring the will to be in writing and introduce all the uncertainty, fraud and perjury which it was the intention of the law to prevent. *Black vs. Hill*, 32 O. S., 313.

(b) An action to contest a will or codicil shall be brought within one year after it has been admitted to probate, but persons within the age of minority, of unsound mind, or imprisoned, may bring such action within one year after such disability is removed; provided, however, that this act shall not apply to wills probated before the passage of this act. Gen. Code, 12087.

(c) The power to dispose of property in this state by will is conferred by statute, and the owner of property is not left free to dispose of it without limitations or restrictions. *Insurance Co. vs. Lushey et al.*, 66 O. S., at 239; See also *Sears vs. Sears*, 77 O. S., 104.

Question 410.

(a) A testator on September 1, 1916, made and executed his will in lawful form, in which he bequeathed the sum of \$5,000 to a hospital for charitable purposes; the testator died March 2, 1917 leaving issue of his body, three sons. Is the bequest to such charitable institution good? Why?

(b) John Smith, a resident of Columbus, Ohio, executed at Columbus, Ohio, his last will and testament in lawful form; James Stewart, no relation to said testator, was one of the witnesses to the will; said will could not be proven without the testimony of said James Stewart, said witness to the will; item five of said will devised to James Stewart the aforesaid witness, a house and lot in the city of Columbus. Is the devise to James Stewart good?

Answer 410.

(a) No.

If a testator dies leaving issue of his body, or an adopted child, living, or the legal representatives of either, and the will of such testator, gives, devises or bequeathes the estate of such testator, or any part thereof, to a benevolent, religious, educational or charitable purpose, or to this state, or to any other state or country, or to a county, city, village or other corporation, or association in this or any other state or country, or to a person in trust for such purposes, or municipalities, corporations or associations, whether such trust appear on the face of the instrument making such gift, devise, bequest or not; such will as to such gift, devise, bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator. Gen. Code, 10504.

(b) The devise is not good.

If a devise or bequest is made to a person who is a witness to a will, and the will cannot be proved except by his testimony, the devise or bequest shall be void. Gen. Code, 10515.

Question 411.

(a) Item No. 2 and item No. 7 of a will executed in Toledo, Ohio, are in conflict. Which provision will be held to prevail?

(b) Draw a will properly signed and attested devising both real and personal property in Ohio.

Answer 411.

(a) No. 7.

Where one devise is as specific as the other, if they are repugnant, the latter must prevail. *Young vs. McIntire*, 3 O., 498.

(b) I, A. B., of Cleveland, Cuyahoga County, Ohio, do hereby make my last will and testament.

I appoint my son, C. D., sole executor of this will and direct that he shall not be required to give bond in qualifying as such executor.

I give and bequeath to E. T., G. H., and I. J., the sum of One Thousand Dollars each. I give and bequeath to my servant K. L., the sum of One Hundred Dollars.

All the rest and residue of my estate, including the real property known as Blackacre where I reside, and all other property of whatever nature and description whatsoever, wherever situated, of which I may die seized, I give, devise and bequeath to my children C. D., M. N., and O. P., to be divided among them in equal portions.

In testimony whereof, I have hereunto set my hand this day of..... in the year..... A. B.

Signed, published and declared by the above named A. B. as and for his last will and testament in the presence of us, who in his presence, and in the presence of each other, and at his request have hereunto subscribed our names as witnesses.

Q. R.  
S. T.

Question 412.

(a) What is a codicil?

(b) From when does a will take effect?

(c) Is it necessary for a will to contain any particular words to pass a fee in land? If so, what words?

Answer 412.

(a) A "codicil" is a supplement to a will, or an addition made by the testator, and annexed to, or to be taken as a part of, a will, by which its dispositions are explained, added to or altered. *Gardner on Wills*, p. 3.

A codicil must be executed with all the formalities of a will.

"In this title (Wills) the term "will" includes "codicils." *Gen. Code*, 10502.

(b) A will is generally presumed to speak from the death of the testator. *Gardner on Wills*, p. 324.

(c) No particular words are required.

Every devise in a will of lands, tenements or heredi-

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taments shall convey all of the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a lesser estate. Gen. Code, 10580.

The burden of proof is thrown by this section upon the party claiming that the devise is of the lesser estate. *Home vs. Lippardt*, 70 O. S., 291; 71 N. E., 770.

Question 413.

(a) A will is made in England and according to the laws of England, devising land in Ohio, but not executed as required by laws of Ohio. Will it or not become operative on lands in Ohio? Why?

(b) What is meant by the residuary clause of a will?

Answer 413.

(a) If admitted to probate in Ohio, it will become operative on lands here.

A will executed, proved and allowed in a country other than the United States and territories thereof, according to the laws of such foreign state or country, may be allowed and admitted to record in this state in the manner and for the purpose mentioned in the following sections. Gen. Code, Sec. 10537.

(b) The residuary clause in a will is that which disposes of property of the testator not otherwise disposed of. *Gardner on Wills*, p. 369.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

**WILLS**

**Question 414.**

(a) Who may make a valid will under the laws of Ohio?

(b) What is meant by residuary legatee in a will?

**Answer 414.**

(a) A person of full age, of sound mind and memory, and not under restraint, who has property, or an interest therein, may give and bequeath it by last will and testament lawfully executed. Gen. Code, 10503.

(b) The residuary clause in a will is that which disposes of property of the testator not otherwise disposed of. Gardner on Wills, p. 369.

"Legatee" is one who takes personal property under a will. Gardner on Wills, p. 3.

Hence a "residuary legatee" is one who takes all the personal property of the testator, not otherwise disposed of.

**Question 415.**

(a) What is a codicil and how should it be executed?

(b) What do you understand by "Probating a Will?"

**Answer 415.**

(a) A "codicil" is a supplement to a will, or an addition made by the testator, and annexed to, or to be taken as a part of, a will, by which its dispositions are explained, added to, or altered. Gardner on Wills, p. 3.

A codicil must be executed with all the formalities of a will.

"In this title (Wills) the term 'will' includes codicils." Gen. Code, 10502.

(b) Probate is essential to the legal validity of a will. By it is meant the certification, by the court or tribunal clothed with authority for that purpose, that the will has been executed by a competent testator in the manner required by law. Gardner on Wills, p. 276.

Proceedings for probate are not adversary, but entirely ex parte, and nothing more is required than that a prima facie case is made, that the testator was of full age, of

sound mind and memory, and free from restraint; that the paper writing propounded is in writing, that it is signed at the end thereof by him, and attested and subscribed in his presence by two or more competent witnesses who saw the testator subscribe or heard him acknowledge the same. 2 O. N. P., N. S., 189; 49 Bull., 379.

Question 416.

John Jones, a resident of the city of Cleveland, Ohio, dies on November 8th, 1919, leaving his widow and three children surviving him.

On October 8th, 1919, being of sound mind and memory he executed a will devising certain property to a charitable institution, and to his son John the residue of his estate. This will was witnessed by the attorney who wrote it and by his son John. The will cannot be proven except by the testimony of the witnessing son John.

(a) Would the widow be entitled to any part of the estate?

(b) Under the laws of Ohio, would the charitable institution take property devised to it?

(c) Would John be entitled to the residuary estate?

Answer 416.

(a) Widow refusing to take under the will of husband is entitled to the same proportion of his personal estate as if he had died intestate. 3 O. C. D., 589; 6 O. C. C., 570.

Where no provision is made in a will for widow or widower, they are entitled to the same distributive share of the personal estate as if the husband or wife had died intestate. 50 O. S., 330; 12 O. C. D., 29; 13 O. C. D., 776.

In cases where wives survive husbands who die intestate, leaving children, the wife takes:

- Her dower interest in the real estate.
- One half of the first \$400 and one third of the balance.
- Use of the mansion house for one year (G. C., §607.)
- The year's allowance provided in (General Code, 10157.) Foster vs. Clifford, 87 O. S., 294.

(b) It would not.

If a testator dies leaving issue of his body, or an adopted child, living, or the legal representative of either, and the will of such testator gives, devises or bequeaths the estate of such testator, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to this state, or to any other state or country, or to a county,



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city, village or other corporation or association in this or any other state or country, or to a person in trust for such purposes or municipalities, corporations or associations, whether such trust appears on the face of the instrument making such gift, devise or bequest or not; such will as to such gift, devise or bequest, shall be invalid unless it was executed according to law, at least one year prior to the death of the testator. Gen. Code, 10504.

(c) He would not.

If a devise or bequest is made to a person who is a witness to a will, and the will cannot be proved except by his testimony, the devise or bequest shall be void. Gen. Code, 10515.

Question 417.

Define "Executor," "Executrix," "Administrator de bonis non with will annexed."

Answer 417.

Executors and administrators are the person or persons to whom is committed the administration of the estates of decedents, the first being that of a person named in a will to execute its provisions the latter that of the officer designated under the law to administer the estate of one who has died intestate, or who has named no executor.

An executor is one to whom another man commits by his last will, the execution of that will and testament. 2 Bla. Com., 503, Bouvier's Law Dictionary.

When a female is appointed for same purpose, she is termed an executrix.

An administration which is granted when an executor dies leaving a part of the estate unadministered. Bouvier's Law Dictionary.

Question 418.

(a) In Ohio, in what time can a will be contested?

(b) Suppose A makes a will and after it is executed, a child is born to A, will such child take any part of the estate of A?

(c) In a trial for the contest of a will upon whom is the burden of proof?

Answer 418.

(a) An action to contest a will or codicil shall be brought within one year after it has been admitted to probate, but persons within the age of minority, of unsound mind, or imprisoned, may bring such action within one

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year after such disability is removed; provided, however, that this act shall not apply to wills probated before the passage of this act. Gen. Code, 12087.

(b) If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision has been made for such child by some settlement, or he is provided for in the will, or in such way mentioned therein so as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received. Gen. Code, 10561.

When, at the time of executing his will, the testator has a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitled to if the testator died intestate. Gen. Code, 10563.

(c) On the trial of such issue, the order of probate shall be prima facie evidence of the due attestation, execution and validity of the will or codicil. Gen. Code, 12083.

After the order of probate has been offered in evidence, the burden of proving the due attestation, execution and validity of the will, is transferred from the propounders to the contestants of the will, and during the progress of the trial, there is no such change of the burden of proof as to require the court to instruct the jury, that in respect to any particular issue, or item of evidence, the burden of proof is thrown back on the contestees. *Mears vs. Mears*, 15 O. S., 90.

The scintilla rule of evidence applies in the trial of a case for the contest of a will, and a motion for a directed verdict in favor of the proponents should be overruled if the contestants have submitted any evidence in support of their contention. *Clark vs. McFarland*, 99 O. S., 100; 124 N. E., 164.

# **OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

## **WILLS**

**Question 419.**

- (a) Define a will.
- (b) What is a nuncupative will?
- (c) What property will pass under a nuncupative will?
- (d) When must a nuncupative will be reduced to writing?

**Answer 419.**

(a) A will is the expression, in the manner required by law, and operative for no purpose until death, of that which one may lawfully require to be done after his death. Gardner on Wills, p. 1.

A will is the expression, in the manner required by law, of the directions given by a person of full age, of sound mind and not under any restraint, owning property or an interest therein, as to the descent, distribution and devolution of his property at his decease, and being revocable by the maker up to the time of his death.

(b) A nuncupative will is an oral will declared by the testator before witnesses. Gardner on wills, p. 44.

(c) It is good as to personal estate. Gen Code, 10601.

(d) It must be reduced to writing within ten days after the speaking of the testamentary words.

**Question 420.**

- (a) Who, in Ohio, may make a will?
- (b) By what authority does a person make a valid will?

**Answer 420.**

(a) A person of full age, of sound mind and memory, not under any restraint, who has property or an interest therein may bequeath it by last will and testament lawfully executed. Gen. Code, 10503.

(b) With certain limitations, the power to make a will disposing of both real and personal property, is conferred by statute upon persons of age and having sufficient capacity for that purpose. Gardner on Wills, p. 10.

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Question 421.

(a) Draw a short will, properly signed and attested, disposing of both real and personal property.

(b) From what time does a will take effect?

Answer 421.

(a) I, A. B., of Cleveland, Cuyahoga County, Ohio, do hereby make my last will and testament.

I appoint my son, C. D., sole executor of this will and direct that he shall not be required to give bond in qualifying as such executor.

I give and bequeath to E. T., G. H., and I. J., the sum of One Thousand Dollars each. I give and bequeath to my servant K. L., the sum of One Hundred Dollars.

All the rest and residue of my estate, including the real property known as Blackacre where I reside, and all other property of whatever nature and description whatsoever, wherever situated, of which I may die seized, I give, devise and bequeath to my children C. D., M. N., and O. P., to be divided among them in equal portions.

In testimony whereof, I have hereunto set my hand this ..... day of ..... in the year .....

A. B.

Signed, published and declared by the above named A. B., as and for his last will and testament in the presence of us, who in his presence, and in the presence of each other, and at his request have hereto subscribed our names as witnesses.

Q. R.

S. T.

(b) A will is generally presumed to speak from the death of the testator. Gardner on Wills, p. 324.

Question 422.

(a) On the first day of October, 1889, Smith executed in proper form his last will and testament, having at that time no children. A child was born to him in January 1890. There was no provision made in said will for the said child. Said child died 1891. Smith died 1895. Did he die testate or intestate?

(b) Can a testator by words of exclusion, such as "they shall have no more of my estate" and "they shall never have any more of my estate" used in his will, disinherit lawful heirs in respect to property not disposed of by his will, there remaining after certain specific bequests of well

defined property, a residue and no disposition made in said will by residuary clause or otherwise of such residue?

**Answer 422.**

(a) Smith died intestate.

The birth of the child revoked the will, and the fact that the testator survived the child did not revive the will. *John Ash vs. James Ash et al*, 9 O. S., 383.

(b) A testator cannot, by any words of exclusion used in his will, disinherit one of his lawful heirs, in respect to property not disposed of by his will.

Such words cannot be used to control the course of descent, so as to carry the property to his other heirs.

They cannot be used to raise an estate by implication in favor of the other heirs; there being no attempt in the will to dispose of the property or to create any interest therein. *Crane vs. Doty*, 1 O. S., 279.

By an almost unbroken line of decisions beginning in the common law and recognized and followed in most of the states including our own, it is established that property undisposed of by a testator descends to the heirs and distributees under the statute of descent and distribution, and the right of an heir to inherit property not disposed of by the will is not affected by a clause in the will attempting to disinherit him. *Leopold Exr. etc. vs. Weaver et al*, 29 O. C. A., 567.

**Question 423.**

(a) What is the difference between a vested and a contingent legacy?

(b) In the distribution of estates, what is the distinction between taking "per capita" and "per stirpes?"

(c) Is a provision in a will that any devisee or legatee who contests the will, shall forfeit his devise or legacy, valid?

**Answer 423.**

(a) A vested legacy is one, the right to whose enjoyment, either present or future, is not subject to the happening of a condition precedent.

A contingent legacy is one, the right to whose enjoyment, is subject to the happening of a condition precedent. *Gardner on Wills*, p. 436.

(b) Distribution is "per capita" when all of the descendants of an intestate, in a direct line of descent, are of an equal degree of consanguinity to the intestate. In which

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case each of the said descendants share equally in the estate. Gen. Code, 8581.

Distribution is "per stirpes" when the descendants of the intestate, entitled to share in the estate, are of unequal degree of consanguinity to the intestate. In which case, those who are of the nearest degree of consanguinity will take the share to which he or she would have been entitled, had all the descendants in the same degree of consanguinity with him or her, who died leaving issue, be living. The legal representatives of the deceased members of the class in the nearest degree of consanguinity, will inherit equal parts of that portion of the estate to which the said deceased member would have been entitled to if living. Gen. Code, 8582 & 8583.

(c) A condition in a will whereby the testator excludes any one of his heirs who "go to law to break his will" from any part or share of his estate, is valid and binding; and effect will be given to it, as well in respect to bequests of personality as to devises of real estate. *Bradford vs. Bradford*, 19 O. S., 546; 11 Longs. 968.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**WILLS**

**Question 424.**

(a) Is the right to dispose of property by will a natural and inalienable right?

(b) Is the right to make a will provided for in the Constitution of Ohio?

(c) What is meant by precatory words in a will?

(d) What is a patent ambiguity?

**Answer 424.**

(a) The right to dispose of property by will is not a natural and inalienable right, but depends entirely upon the legislative will. The statute of wills passed in 1540 is the first legislative expression giving a full and complete right to make a will.

(b) Article 1, Sec. 1 of the Constitution of Ohio provides, among other things that all men have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring and protecting property.

It is well that these inalienable rights are possessed by living, not dead men, as this section does not recognize any inherent testamentary power. *Patton vs. Patton*, 39 O. S., 590.

(c) Precatory words are words less strong than command, i. e., words of expectation, hope, desire or recommendation.

(d) A patent ambiguity is one which is manifest upon the face of the instrument, expressing a double or doubtful meaning.

**Question 425.**

A, the owner of real estate, verbally agrees with B, that in consideration of personal service to be rendered by B for A so long as A lives, A will devise to B all his real estate absolutely. B performed his part of the agreement, but upon the death of A it was discovered that he had left no last will and testament.

What remedy or remedies, if any, has B?

**Answer 425.**

(a) B has a remedy in damages or a right to specific performance against the heirs of A. 15 O. S., 160.

**Question 426.**

(a) A and B who were brothers, were owners as tenants in common of 40 acres of land; and, being of sound mind and under no restraint, they jointly made a last will and testament properly executed in which they devised said lands to their nephew C in fee. A, who had never been married, died first. B had a wife and child when the will was executed, and he died leaving them surviving him. After the death of B, the joint will was offered for probate by C. Should the will be admitted to probate or not?

(b) Give reason for your answer.

**Answer 426.**

(a) The will should be admitted to probate. Ballard vs. Ballard, 26 O. C. C., N. S., 490.

(b) It is said in the case of Walker vs. Walker, 14 O. S., 157 that a joint will is unknown to the testamentary policy of the state, and is inconsistent with the policy of its legislation on the subject. However, in the case of Ballard vs. Ballard cited above, the court holds that where tenants in common of real estate join in a single will, not in the nature of a contract, and where the feature of revocability is preserved in the instrument, such a will is valid. See also Betts vs. Harper, 39 O. S. 639.

**Question 427.**

(a) A, who was a widower without children, several days prior to his second marriage, and without the knowledge of his intended wife, executed a will providing that all of his property, which consisted of personalty only, should go to his parents. Of this marriage a child was born which lived but a few days. Shortly thereafter, A died, leaving no other will than the foregoing. Under this state of facts, to what part of A's property was his widow entitled?

(b) What is the principal rule followed by the courts in the construction of wills?

**Answer 427.**

(a) The will of this testator is revoked by the birth of the child. General Code, 10561.

The fact that the testator survives the child does not



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revive the will revoked under these circumstances: *Ash vs. Ash*, 9 O. S., 383.

Under the state of facts given the widow is sole heir to her husband's property. Gen. Code, 8574.

(b) A cardinal rule of testamentary construction is that the plain intent of the testator, as contained in the language of the will, must prevail, if it does not offend public policy.

Question 428.

(a) In what court would you commence proceedings to construe a will?

(b) To contest a will?

(c) Within what time may proceedings to contest a will be commenced?

(d) What is an administrator with the will annexed?

Answer 428.

(a) In the Common Pleas Court.

(b) In the Common Pleas Court?

(c) Within one year after the will has been admitted to probate; but persons within the age of minority, or of unsound mind or in prison, may bring this action within one year after such disability has been removed. Gen. Code, 12087.

(d) An administrator with the will annexed is one appointed by the court to carry out the provisions of a will when the testator has named no executor, or the executor named has refused or is incompetent to act, or has died before entering upon his duties. His duties are substantially those of an executor. Such an administrator must follow the statute rules of distribution, except when otherwise directed by the will. Bouvier's Law Dictionary.

Question 429.

(a) A testator before signing his will wrote the words "I give my gold watch to my brother John, and I direct that my executor be not required to give bond" immediately below the attestation clause, and then signed his name above the attestation clause in the presence of the subscribing witnesses.

Is this a signing as required by General Code?

(b) Under what circumstances may a lost will be probated.

Answer 429.

(a) This will is not signed at the end as required by General Code, 10505 and hence the will is invalid.

It is held that the words "my executrix is not required to give bond" added below the place of signing do not avoid the rest of the will as not being signed at the end thereof. *Baker vs. Baker*, 51 O. S., 317.

This for the reason that these words are not dispositive.

In the state of facts given however, a dispositive clause is added to these words thus invalidating the will.

(b) The probate court may admit to probate a last will and testament which it is satisfied was executed according to the provisions of law in force at the time of its execution, and not revoked at the death of the testator, when such original will was lost, spoiled or destroyed, subsequent to the death of such testator, or after he became incapable of making a will by reason of insanity, and it can not be produced in court in as full, ample and complete a manner as the court now admits to probate last wills and testaments, the originals of which are produced therein for probate. Gen. Code, 10543.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### WILLS

#### Question 430.

M. J., the wife of one E. J., separated from her husband and married one J. M., both parties knowing E. J. to be still living and not divorced. Thereafter during the life of E. J., and while living with J. M., said M. J. executed her last will and testament in which she gave all of her estate to J. M. In an action by E. J. and others to contest said will on grounds of alleged fraud and undue influence of M. J. in procuring said will to be executed, the plaintiffs among other propositions asked the court to charge the jury as follows:

"If a man knowingly and wrongfully marries and cohabits in a state of adultery with a woman who is the lawful wife of another man, and whose husband has not forfeited his claims to her comfort and society, and by the influence of such marriage and co-habitation, procures a will from her in his favor, and disinheriting her real husband, that will is void for illegal influence."

Was said request for instruction correct or incorrect?

#### Answer 430.

Where, on the contest of a will, the court was requested to charge the jury that if a man knowingly marries and cohabits with the wife of another, and by the influence of such marriage and cohabitation procures a will from her in his favor, the will is void for illegal influence; HELD: That, unless the influence mentioned placed the testatrix under some restraint, it was not such illegal influence as would invalidate her will; and, as such restraint cannot necessarily be implied from the facts assumed, it was not error to refuse to charge as requested; and whether such restraint existed was properly left to be determined by the jury, under the instruction that if it did, then the will was void. *Monroe et al., vs. Barclay et al.*, 17 O. S., 302.

#### Question 431.

A testator desiring to revoke certain items only (the 10th and 11th) of his will, detached therefrom the page on which said items were written leaving intact the rest of

the will including the attestation clause and the signatures of the testator and witnesses. After tearing up the detached sheet and throwing the pieces in a waste basket the same were recovered without his knowledge by a member of his family, who rearranged the same in their original connection to its original position in the will. In this condition, without any previous knowledge on the part of the testator of the restoration of the destroyed page, the will was offered for probate.

In the above supposed case was said will to any extent the valid last will and testament of the testator, and if so, how much of said will was valid? Give reasons for answer.

Answer 431.

The whole will should be admitted to probate, including the part detached as a valid part of the said will.

Under General Code, 10555, which provides for the revocation of wills, a clause of a will cannot be revoked by the testator drawing ink lines through the words thereof, with, an intent to revoke such clause, but not with an intent to revoke the whole will. In such case, when the words of such clause remain legible, the whole will should be admitted to probate, including such erased clause as a valid part of such will. (*Giffin vs. Brooks*, Ex. 3 C. C., 110, approved); *Giffin et al. vs. Brooks*, Exr. et al, 48 O. S., 211.

Question 432.

State the legal consequences attending the birth of a child to the testator after the execution of his will (1) where said testator had no child at the time of executing his will (2) where he had a child at the time of executing his will?

Answer 432.

(1) If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless

—Provision has been made for such child by some settlement;

—Or he is provided for in the will;

—Or in such way mentioned therein as to show an intention not to make such provision.

No other evidence to rebut the presumption of revocation shall be received. Gen. Code, 10561.

(2) When, at the time of executing his will, a testator has a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitled to if the testator had died intestate. Gen. Code, 10563.

**Question 433.**

A testator, after making certain specific devises in his will, provided therein that "whatever there remains after my decease shall be divided among my lawful heirs" without further designation. He died leaving three children and two grandchildren children of a deceased son.

How should the residuary estate be divided? Give reasons.

**Answer 433.**

The residuary estate should be divided into four equal parts, the three children each being entitled to one of the parts, and the remaining part being divided equally between the two grand children, children of the deceased son.

When a devise of real or personal estate is made to a child or other relative of the testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case such issue shall take the estate devised as the devisee would have done, if he would have survived the testator. Gen. Code, 10581.

Where property was devised to the "legal heirs" of testator's deceased brother, all persons who, at the time of the death of the deceased brother are his "legal heirs" shall share in the property, and if any of such legal heirs had died when the will was made, leaving issue surviving the testator, such issue shall take the share of such deceased "legal heir." *Youngblood vs. Youngblood*, 11 O. C. C., N. S., 276; 20 O. C. D., 482. Affirmed without report, 78 O. S., 405.

**Question 434.**

A will bequeathing certain specific legacies payable from a fund derived from particular property contained a residuary clause limited in terms to "the balance" that remained after the payment of said legacies. One of the legacies was to a son who died before the testator leaving an adopted daughter. The legacy given by the will to the deceased son is claimed by the adopted daughter, by the residuary legatee

and by certain other persons claiming under the statute of descent and distribution from the testator.

Who gets it, and why?

Answer 434.

The legacy descends as intestate property, to those persons entitled under the statute of descent and distribution.

When a devise of real or personal estate is made to a child or other relative of a testator, if such child or other relative was dead at the time the will was made, or dies thereafter, leaving issue surviving the testator, in either case the issue shall take the estate devised as the devisee would have done if he had survived the testator. If such devisee leaves no such issue, and the devise be of a residuary estate to him or her, and other child or relative of the testator, the estate devised shall pass to, and vest in such residuary devisee surviving the testator, unless a different disposition be made or required by the will. Gen. Code, 10581.

Adopted child cannot save a legacy from lapsing. "Issue" does not include such child. *Phillips vs. McConica*, 59 O. S., 1; *Theobald vs. Fugman*, 64 O. S., 473.

The words "residuary estate" in this statute are held to be used in a technical sense and should be given their technical meaning, when it becomes necessary to construe the same to determine their legal effect. *Jewett vs. Jewett*, 21 O. C. C., 278.

Applying this construction to the language of the will, "the balance" is not a devise or bequest of a residuary estate, so that the so-called "residuary legatee" is not within the exception mentioned in Section 10581, General Code, relating to residuary legatees. See *Hess Admr. vs. American Bible Society*, 26 O. C. C., N. S., 439.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

### **WILLS**

#### **Question 435.**

A made her will January 1, 1920, and at that time she had no child or children. She gave to the Y. M. C. A. the sum of ten thousand dollars, and the balance of her property she gave to her husband. On June 1, 1921, a child was born which was survived by the mother, who later died. You are consulted by the executor who is named as such in the will, as to the probating of the will. What would you advise, and why?

#### **Answer 435.**

The will is void, as it was wholly revoked by the birth of the child.

"If the testator had no children at the time of executing his will, but afterward has a child living, or born alive after his death, such will shall be revoked, unless provision for such child has been made by some settlement, or he is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision. No other evidence to rebut the presumption of revocation shall be received." Ohio Gen. Code, 10561.

Where a testatrix having no child, made a will, but afterward had a living child which she survived, it was held that the birth of the child revoked the will; and the fact that the testatrix survived the child did not revive the will. *Ash vs. Ash*, 9 O. S., 383; and in the case of *Evans vs. Anderson*, 15 O. S., 324, it was held that where a child of a testator is born after the probate of his will, the birth of the child avoids the will.

#### **Question 436.**

A has two children and a husband. She made her will giving all her property to her husband, which will was made in 1918. In 1920 another child was born to her. She died leaving her husband and three children surviving. What interest, if any, has the last born child in the estate? Why?

#### **Answer 436.**

An undivided one third interest in the property.  
"When, at the time of executing his will, a testator has

a child absent and reported to be dead, or having a child at the time of executing the will, afterward has a child who is not provided for therein, the absent child, or child born after executing the will, shall take the same share of the estate, real and personal, that he would have been entitled to if the testator had died intestate." Ohio Gen. Code, 10563.

Where a testatrix, who had a living child, devised all her estate to her husband without making provision for her after-born child, such child, if it survive the testatrix, will, by virtue of the provisions of G. C., 10563, inherit from the mother as heir at law, as if the mother died intestate, although by clear and explicit language, the mother attempted to disinherit the child. *Insurance Co. vs. Lushey*, 66 O. S., 233; 64 N. E., 120.

Question 437.

A is the administrator of the estate of B. The inventory and appraisement shows money and property of the value of five hundred thousand dollars. A is indebted to C in the sum of one thousand dollars, who figures that upon final settlement of the estate, A will receive about ten thousand one hundred and twenty dollars for his services as administrator, and asks for payment now. A asks him to wait until the amount due him as administrator is allowed by the Probate Court, but C is not disposed to wait and consults you as to bringing suit in attachment. Would you bring such suit, if not, why not?

Answer 437.

The suit should not be brought.

"Property or money held by the Executor or Administrator of an estate in his representative capacity, cannot be reached by attachment or garnishee process in an action against the heir or legatee before an order of distribution has been made."

"The fact that the legislature did not specifically name Executors and Administrators in G. C. 11819 or in apt language designate or describe them, clearly, shows, we think, an absence of intention on its part to include them in its provisions." *Orlopp vs. Schueller*, Admr. de bonis n6n 72 O. S., 41.

Until allowed by the Probate Court, the compensation and commissions of an executor or administrator to which he may be entitled in the settlement of an estate, cannot be attached, or by any similar process, appropriated to the



## BAR EXAMINATIONS

payment of his claim by a creditor of such executor or administrator. *Overturf vs. Gerlach*, 62 O. S., 127.

Question 438.

Your client who is an interested party in a will which has been probated in the Probate Court, seeks your advice as to having the order of the Probate Court admitting said will to probate reviewed on error. Is the order admitting to probate such will, reviewable on error?

Answer 438.

The order is not reviewable on error.

"A person interested in a will or codicil admitted to probate in the Probate Court, or Court of Common Pleas on appeal, may contest its validity by a civil action in the Common Pleas Court of the county in which such probate was had." Ohio Gen. Code, 12079.

The mode of contesting a will admitted to probate, provided by statute, is exclusive. *Mosier vs. Harmon*, 29 O. S., 220.

This jurisdiction is original, and not appellate. *Bradford vs. Andrews*, 20 O. S., 208.

Question 439.

A testator bequeathed and devised all his personal property and real estate to his four sons, share and share alike. He had inserted in his will a provision, that if any one of them brings an action in court to set aside his will, such one shall forfeit his share so bequeathed and devised to him. One of the sons brought an action to set aside the will. The will was sustained. What becomes of the share so bequeathed and devised to such son, there being no provision in the will as to where such forfeited share shall go?

Answer 439.

"A condition in a will, whereby the testator excluded any one of his heirs who "goes to law to break his will" from any part or share of his estate, is valid and binding; and effect will be given to it, as well in respect to bequests of personalty as to devises of real estate."

"A legacy forfeited by the breach of such a condition will pass to the general residuary legatees named in the will, without express words to that effect in the will." *Bradford vs. Bradford*, Executor, 19 O. S., 546.

Under the state of facts given there being no residuary legatee nor devisee, the forfeited share descends as intestate property to the legal heirs of the testator.

## **OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

### **CORPORATIONS**

**Question 440.**

- (a) What is meant by "the power of eminent domain?"
- (b) "Ultra vires?"

**Answer 440.**

(a) The term eminent domain is used to indicate the right of a sovereignty to retain or take or damage property for a public use against the wishes of the owner, rendering him adequate compensation therefor.

(b) Ultra Vires is the modern technical designation, in the law of corporations, of acts beyond the scope of their powers, as defined by their charters or acts of incorporation. Bouvier's Law Dictionary.

**Question 441.**

(a) For what purpose may private corporations be formed in Ohio?

(b) State the steps necessary in forming a private corporation.

**Answer 441.**

(a) Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons may lawfully associate themselves. Gen. Code, 8623.

A corporation formed to buy or sell real estate, shall expire by limitation in twenty five years, from the date on which its articles of incorporation were issued by the secretary of state. Gen. Code, 8648.

Section 8648 has been amended in 109 O. L., 197, to allow a renewal for an additional period of twenty-five years.

(b) Articles of incorporation must be filed with the Secretary of State, which in substance and form must comply with the following statutes:

Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

## **HAR EXAMINATIONS**

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1. The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have a capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth:

(a) The kind of improvement intended to be constructed.

(b) Its termini, and the counties in or through which it or its branches will pass. Gen. Code, 8625.

Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgement of deeds, the form of which shall be prescribed by the Secretary of State. The official character of the officer before whom the articles of incorporation are acknowledged, shall be certified by the clerk of the Common Pleas Court of the county wherein the acknowledgement is taken. Gen Code, 8626.

Question 442.

(a) Who is charged with the control of a corporation for profit in Ohio?

(b) Of a corporation not for profit?

Answer 442.

(a) The board of directors.

(b) The board of trustees. Gen Code, 8660.

Question 443.

(a) Are special charters granted for corporations by the Legislature of Ohio?

(b) Is there double liability of stockholders in this state?

Answer 443.

(a) No.

The General Assembly shall pass no special act conferring corporate powers. Ohio Constitution, Art XIII, Sec. 1.

(b) In certain cases there is.

In no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. Ohio Constitution, Art. XIII, Sec. 3.

Question 444.

Assuming that a corporation organized for the purpose of loaning money on collateral security, engaged in the business of manufacturing automobiles.

(a) Can a stockholder prevent such transaction?

(b) How?

Answer 444.

(a) Yes.

(b) By suit for an injunction against such misapplication of the funds of the corporation.

A stockholder may bring an action in equity to prevent the directors of a corporation from misappropriating the capital thereof in violation of their trust and duty. *Dodge vs. Woolsey*, 59 U. S., (18 How) 331; 3 O. F. D., 300.

No corporation shall employ its stocks, means, assets or other property, directly or indirectly, for any other purpose than to accomplish the legitimate objects of its creation. Ohio Gen. Code, 8684.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### CORPORATIONS

#### Question 445.

- (a) How is a corporation formed in Ohio?
- (b) How is ownership of an interest in a corporation generally evidenced?
- (c) How is an interest in a corporation conveyed from a seller to a buyer thereof?
- (d) For what, if anything, is a stockholder in an Ohio Corporation formed in 1910 liable to creditors in event that a creditor's suit shows the company to be totally insolvent?

#### Answer 445.

(a) By filing in the office of the Secretary of State, articles of incorporation, duly executed and acknowledged. Gen. Code, 8625 and 8626.

(b) By the possession of a certificate of stock.

(c) Title to a certificate and the shares represented thereby can be transferred only

1. By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same or the shares represented thereby signed by the person appearing by the certificate to be the owners of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person. Gen. Code, 8673-1.

(d) Assuming that the corporation in question is not one of those authorized to receive money on deposit, the stockholder would be liable to the creditors of the corporation to the extent of his unpaid stock subscription.

#### Question 446.

The president and secretary, on instruction to that effect by the directors of an operating company, subscribed for stock of a new company at its organization organized for a different purpose. A stockholder objected. If he asked you if he was entitled to a relief and to get it for him, what would be your answer, procedure, and why?

Answer 446.

He is entitled to relief.

I would file a suit praying for an injunction against the proposed purchase of the stock.

"A private corporation also may purchase, or otherwise acquire and hold shares of stock in other kindred but not competing private corporations, domestic or foreign. This shall not authorize the formation of a trust or combination for the purpose of restricting trade or competition. Gen. Code, 8683.

Question 447.

A secured incorporation and charter for a corporation of which he expected to be general manager. Pending the organization of the company he purchases materials and employed, under a yearly contract in writing, operatives, which were used by the concern after it started operation with A as general manager. After four months the operatives were discharged. They sued for breach of contract and the company claimed lack of knowledge of the yearly contract, and want of authority in the manager to contract for the company at the time he did.

Who should prevail and why?

Answer 447.

If the plaintiffs fail to prove knowledge and consent of the company, as to the yearly contracts, they cannot recover thereon.

"There is real difficulty in saying that there may be "ratification" by a body which had no existence and therefore no power to do or authorize the act when done. Some courts, realizing the difficulty, have held that there may be an "adoption" but not "ratification." One difference in result is that in the case of adoption, the contract is not deemed to be made until the date of the adoption, while in the case of ratification the contract is deemed to be made from the beginning."

"The person alleged to have ratified must, at the time of the alleged ratification, have either had full knowledge of all the material facts, relating to the act ratified, or he must have deliberately assumed responsibility for the act, having all the knowledge of the facts which he cared to have. Knowledge of the material facts is essential, but knowledge of the legal effect of those facts is not essential." Mecham on Agency, Sec. 83.

Question 448.

A sold to B shares of stock in a corporation, delivering

## BAR EXAMINATIONS

a certificate which made no mention as to whether the company had been paid for the stock. On dissolution of the company and a division of assets, it developed that A owed twenty-five per cent of his subscription contract for the stock and the company withheld that amount from B in distributing on the shares. B sued the company. Who should prevail, and why?

**Answer 448.**

B should prevail.

"The question whether the purchaser of shares is bound to take notice that the stock he purchases is not fully paid for, is a serious and complicated one. The better opinion, and the one most in accord with the usages and demands of the trade is that, where one buys stock in the open market, in good faith and without notice that the subscription price thereof has not been fully paid up, such a purchaser cannot be held liable to pay the unpaid balance of the subscription." Cook on Corporations, Sec. 257. Cited and followed in *Roebblings' Sons vs. Shawnee Valley Coal Co.* 4 O. N. P., N. S., 113; 121.

**Question 449.**

A company, by its directors all agreeing, made a contribution to a church building project, also a political campaign fund of one of its stockholders, also to the erection of a library building.

Will the law afford X, an objecting stockholder, relief? What will it be, and why?

Suppose, at the annual stockholders' meeting succeeding the acts named when X first learned of them, a majority had voted approval of these acts, would X's action, if he can maintain one, stand in a different light, and why?

**Answer 449.**

X has a right to compel the restitution to him of the proportionate share of the contribution if made, and to an injunction to prevent the contributions if not made. He would have the same right if a majority of the stockholders approved of the action of the directors.

"The action is to prevent the giving away of the plaintiff's property." *Sutton vs. Stacey Mfg. Co.*, 17 O. N. P., N. S., 497.

The contribution to the campaign fund is wholly illegal. Gen. Code, 8729.

The other contributions are ultra vires.

**OHIO STATE BAR EXAMINATION  
JUNE, 1920**

**CORPORATIONS**

**Question 450.**

(a) For what purposes may a corporation be formed under Ohio Laws?

(b) How many persons are required to form a corporation in Ohio?

(c) What qualifications as to citizenship are required as to incorporators in this state?

**Answer 450.**

(a) Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves. Gen. Code, 8623.

(A corporation formed to buy or sell real estate is limited in its corporate life to twenty-five years.) Gen. Code, 8648. (Amended in 109 O. L., permitting renewals for second period of twenty-five years.)

(b) Any number of persons, not less than five. Gen. Code, 8625.

(c) A majority of the incorporators must be citizens of the state. Gen. Code, 8625.

**Question 451.**

What must the articles of incorporation contain?

**Answer 451.**

1. The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have a capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation must also set forth—

(a) The kind of improvement intended to be constructed.

(b) Its termini, and the counties in or through which it or its branches will pass. Gen. Code, 8625.



## **BAR EXAMINATIONS**

**Question 452.**

(a) What officers exercise, conduct and control the powers, business and property of a corporation?

(b) By whom are the directors chosen?

(c) Name the classes of stock permitted under the laws of Ohio.

**Answer 452.**

(a) The corporate powers, business and property of corporations formed under this title shall be exercised, conducted and controlled by the board of directors; or, if there is no capital stock, by the board of trustees. Gen. Code, 8660.

(b) By the stockholders. Gen. Code, 8635.

(c) If a corporation be organized for profit, it must have a capital stock, which may consist of common and preferred, or common only; but at no time shall the amount of the preferred stock at par value exceed two-thirds of the actual capital paid in in cash or property. General Code, 8667.

**Question 453.**

Action was brought by an administratrix to recover damages against a municipality for injuries wrongfully inflicted upon A from which he died. The petition alleges while A was on a cross walk he was struck and run over by the hose wagon belonging to the city which was returning to its station; that it was driven in a reckless and negligent manner diagonally from the northwest, cutting the corner at a high rate of speed without warning and on the wrong side of the street.

The city demurred to the petition on the ground that the city was not liable for the negligent driving of the hose truck operated by a member of the city fire department while in the performance of his duties.

(a) Should the demurrer be sustained or overruled?

(b) Why?

**Answer 453.**

The demurrer should be overruled.

A modern city may be said to be a great public service corporation, and no reason is apparent why, in the respect in which it entrusts purely ministerial duties to agents and employees, it should not be subject to the liabilities of such persons and companies. The rule of the common law is that the king can do no wrong, but to adhere to the ancient rule

in the presence of existing relations would be to involve the absurd contradiction that a state, which is sworn to protect society, is under no obligation, when acting for itself, to protect individual members of society. If the motor truck was going to the fire, a very different situation would be presented for the consideration of the trial court and jury, from one in which it was returning from a fire. *Fowler vs. City of Cleveland*, 100 O. S., 158.

Question 454.

The F & Company, a corporation, made a conveyance of all its property for an adequate consideration, free from fraud. At the time of the conveyance A had a valid cause of action against the F & Co. for personal injury caused by the negligence of the said corporation upon which he brought his action, after the conveyance, and recovered a judgment for \$1250. A commenced suit to subject the property thus transferred to the purchaser to the payment of his judgment. Should A prevail?

Answer 454.

A should prevail.

There is a consistent determination by courts to look through corporate forms, and this disposition is shown with increasing firmness as the interests of justice require. In *State ex rel, vs. Standard Oil Co.*, 49 O. S., 137, it was HELD:

"That a corporation is a legal entity, apart from the natural persons who compose it, is a mere fiction, introduced for convenience in the transaction of its business, and of those who do business with it; but like every other fiction of the law, when urged to an interest and purpose not within its reason and policy, may be disregarded. To the same effect are

*Volksblatt Co. vs. Hoffmeister*, 62 O. S., 189.

*First Natl. Bank vs. Trebein Co.*, 59 O. S., 316.

*Parkside Cemetery Assn. vs. C. B. & G. L. Trac. Co.*, 93 O. S., 161, 168.

"The plaintiff in error, being a mere continuation of the Strawboard Company, whose stockholders received the cash from and stock in the new company, is liable for the payment of the judgment involved in this case." *Auglaise Box Board Co. vs. Hinton et al*, 100 O. S., 505.

Question 455.

A corporation, at a judicial sale, purchased a portion of a railroad incorporated in Ohio as a common carrier. The purchasing company devoted the part purchased to its

## BAR EXAMINATIONS

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own private use and ceased to operate it as a common carrier. The State commenced an action in Quo Warranto to oust the purchaser from the property. Should the action be maintained? Why?

Answer 455.

Yes.

Where a railroad company organized under the laws of this state with authority to exercise the sovereign powers of the state has constructed and operated as a common carrier a line of railroad, portions of which are along and across the public highway, or other railroads, such railroad becomes **IMPRESSED WITH A PUBLIC INTEREST**. A purchaser thereof, either at a judicial sale or otherwise, has no right to operate it for its own private purposes, or the purposes of those with whom it may privately contract, to the exclusion of the public. State ex rel. vs. Black Diamond Co., 97 O. S., 24.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1920

### CORPORATIONS

Question 456.

- (a) How is a private corporation for profit formed in Ohio?
- (b) Define the terms "de facto corporation," "franchise," "ultra vires," "preferred stock."
- (c) In general what powers have all corporations?

Answer 456.

(a) Any number of persons not less than five, the majority of whom are citizens of this state, must subscribe and acknowledge articles of incorporation, which must contain:

1. The name of the corporation, which unless it is not for profit, shall begin with the word, "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located or its principal business transacted.

3. The purpose for which it is formed

4. The amount of its capital stock, if it is to have a capital stock, and the number of shares into which it is divided.

5. But if the corporation is for a purpose which includes the construction of an improvement not to be located at a single place, the articles of incorporation should also set forth:—

(a) The kind of improvement intended to be constructed.

(b) Its termini, and the counties in or through which it or its branches will pass.

These articles of incorporation must be subscribed by the incorporators and acknowledged before an officer competent to administer oaths. The articles of incorporation are then forwarded to the Secretary of the State, for filing in that office.

(b) A "de facto" corporation is created where persons in good faith organize under a statute that is valid to authorize such a corporation, and by reason of failure to comply with the statute there is not a corporation de jure. To constitute a corporation de facto there must be:

## BAR EXAMINATIONS

1. A valid law authorizing such a corporation.
2. An attempt in good faith to organize under the statute.
3. At least a colorable or apparent compliance with the statute.
4. An assumption of corporate powers.

Blackstone defines a franchise as "a royal privilege or prerogative subsisting in the hands of a subject." A franchise is a special privilege conferred by the government on individuals, firms or corporations, which does not belong generally by common right to individuals, firms, or corporations.

An **ULTRA VIRES** act is an act of a corporation which is beyond the powers conferred on the corporation by its charter or by the statute under which it was created.

**PREFERRED STOCK** is that stock which entitles the owner to the whole of a dividend up to a certain amount before the rest of the shares are entitled to any. Other preferences in favor of this stock may also be made by the regulations or by-laws of a corporation.

(c) Corporations have all of those powers which are specially granted in its charter, or which are derived therefrom by necessary implication. All corporations have a right to existence as a body corporate, with succession, power to sue and be sued, contract and be contracted with, and unless especially limited, to acquire and hold all property, real or personal, necessary to effect the objects for which the corporation was created. A corporation may also make, use and at will alter a common seal.

### Question 457.

The Columbus Realty Company, a private corporation for profit, borrowed \$10,000 from A, and as security for repayment of the money gave A a mortgage on the real estate of the Company. By mistake this mortgage was signed by the stockholders in their own names and not by the corporation. Later the company gave a mortgage on the same property to B, C and D, creditors of the company, and by its terms the subsequent mortgage was made subject to the mortgage of A. C, who did not assent to the second mortgage then proceeded to obtain a judgment lien against the company. The property of the company being insufficient to pay all the creditors, in what order should the claims of A, B, C and D be paid?

**Answer 457.**

The mortgage given to A had priority, because of its recognition in the second mortgage. 10 Ohio, 2.

B, C & D are entitled to pro rata in the fund after the payment of the first mortgage. The second mortgage is good without being accepted by the mortgagees. It inures to the benefit of all who accept under it. Bundy vs. Iron Company, 38 O. S., 300.

**Question 458.**

Brown who was promoting the organization of the Columbus Car Wheel Co., entered into a written lease with Adams by the terms of which Adams leased certain real estate to Brown for a period of five years reserving a rent which Brown covenanted to pay. The lease was executed by Adams, and by Brown, 'as agent for the Columbus Car Wheel Co. about to be formed.' That company was formed and both its directors and stockholders voted to "ratify and adopt" the said lease and Brown assigned the lease to the company. For about one year the company paid the rent to Adams under the lease and then became insolvent. What, if any, remedy has Adams against Brown?"

**Answer 458.**

Adams has no remedy against Brown. Brown might have been liable to Adams under his warranty of authority but because the corporation actually did enter into the lease and pay rent thereunder a contractual obligation is created between Adams and the corporation and Brown as agent has dropped out.

**Question 459.**

The Cleveland Dry Goods Company is a corporation operating a large department store in the city of Cleveland and engaged in the business of selling clothing and dry goods at retail. The corporation decided that if a barber shop were in the department store it would tend to increase its business and it accordingly caused a barber shop to be fitted out, and employed Jones as one of the barbers. The expenses of this were paid by the company, and the receipts went into its treasury. Shortly after the barber shop was opened and while Jones was acting as a barber in the shop, he negligently infected Smith with a contagious disease. Smith brings suit against the company to recover the damage done him. What judgment?

## BAR EXAMINATIONS

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### Answer 459.

The company is liable. The dry goods company by conducting the barber shop and permitting the negligent act to occur therein is estopped from setting up the defense of ultra vires.

### Question 460.

Five men have been associated in business as partners. The partnership property has an actual value of \$50,000 of which each partner owns an equal share. The partners form a corporation with a capital stock of \$100,000 under the laws of Ohio, to continue the partnership business and they transfer to the corporation all the partnership property at a valuation of \$100,000 in exchange for the entire capital stock of the company which is issued to the partners or as they direct in proportionate shares. The stock is issued as fully paid up. The corporation afterwards becomes insolvent. What recourse, if any, have the creditors of the corporation?

### Answer 460.

The creditors of the corporation have a right to proceed against the members of the partnership to the extent of \$50,000.00. This because they have issued stock at an inflated valuation and the amount of \$50,000.00 is not represented by any of this. *Gates vs. Stone Company*, 57, O. S., 60.

The constitutional provision in reference to this matter is that "in no case shall any stock holder be individually liable otherwise than for the unpaid stock owned by him or her."

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### CORPORATIONS

Question 461.

- (a) Define a corporation.
- (b) How are corporations organized under the laws of Ohio?
- (c) Define the difference between a corporation and a partnership.
- (d) How are corporations divided under the laws of Ohio?
- (e) Give Article 13, Section 3, of the Constitution of Ohio, and how it applies to corporations?

Answer 461.

(a) A corporation aggregate is a collection of individuals united by authority of law under a special denomination, with the capacity of perpetual succession, and of acting in many respects as an individual. Every corporation aggregate consists of a collection of individuals and has a legal entity which is for many purposes, in contemplation of law, separate and distinct from the members who compose it. Clark on Corporations, Sec. 1-3.

(b) By filing with the Secretary of State, articles of incorporation which in substance and form must comply with the following statutes:

Any number of persons, not less than five, a majority of whom are citizens of this state, desiring to become incorporated, shall subscribe and acknowledge articles of incorporation, which must contain:

1. The name of the corporation, which unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law.

2. The place where it is to be located, or its principal business transacted.

3. The purpose for which it is formed.

4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which it is divided.

5. But, if the corporation is for a purpose which includes the construction of an improvement not to be located



## BAR EXAMINATIONS

at a single place, the articles of incorporation must also set forth—

- (a) The kind of improvement intended to be constructed;
- (b) Its termini, and the counties in or through which it or its branches will pass. Gen. Code, 8625.

Articles of incorporation shall be acknowledged before an officer authorized to take the acknowledgement of deeds, the form of which shall be prescribed by the secretary of state. The official character of the officer before whom articles of incorporation are acknowledged, shall be certified by the clerk of the common pleas court of the county wherein the acknowledgment is taken. Gen. Code, 8626.

(c) A corporation is a legal entity or person created by special authority from the state or the sovereign. Though it consists of a number of individuals, it has a legal existence apart from any of them. Hence it may sue or be sued in its corporate name. It may sue its members or be sued by them. It may own property and incur liabilities with regard to it. It owns the profits made in any business in which it may engage. The death or retirement of a stockholder, by sale or otherwise, does not in any way affect the identity of the corporation. The liability of the shareholders does not, ordinarily, extend beyond the amount of their subscriptions to the capital stock.

On the other hand, a partnership is created by the agreement of the parties. Though it transacts business as an individual might, it has no legal existence apart from the members composing it. It is not a legal person, and can acquire no rights and incur no liabilities. Hence it cannot sue or be sued as an entity. Its property is their property. Its rights are their rights, and can be enforced by them. The death or retirement of a member destroys the partnership. Each member is individually liable for the whole of the obligations of the partnership, even though he has paid in full his contribution to the partnership capital. *Gitmore on Partnership*, page 41.

- (d) For profit and not for profit.
  - Private and public.
  - Municipal and Public Quasi.
  - Quasi Public.

(e) Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable otherwise than

## OHIO SUPREME COURT

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for the unpaid stock owned by him or her; except that stockholders of corporations authorized to receive money on deposit shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporations, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. No corporation not organized under the laws of this state, or of the United States, or person, partnership or association shall use the word "bank," "banker," or "banking" or words of similar meaning in any foreign language, as a designation or name under which business may be conducted in this state unless such corporation, person, partnership or association shall submit to inspection, examination and regulation as may be hereafter provided by the laws of this state. Ohio Constitution, Art. XIII, Sec. 3.

Question 462.

- (a) How does a corporation dispose of its real estate and execute a deed under laws of Ohio?
- (b) How is a National Bank created?
- (c) How are corporations created in Ohio?
- (d) How may a corporation be dissolved?
- (e) State how the liability of stockholders has been changed since 1851 under the constitution of the state of Ohio?

Answer 462.

(a) There is no general statute directing the form or manner of execution of deeds by corporations. *Tiffin vs. Shawhan*, 43 O. S., 178.

The corporate powers, business and property of a corporation must be exercised, conducted and controlled by the board of directors. *Belting Co. vs. Gibson*, 68 O. S., 442.

Therefore, a corporation can only dispose of its real estate, through action of its board of directors, and by deed executed and acknowledged by those of its officers upon whom the power so to do, has been conferred by the said board.

A corporate mortgage, signed by the president and secretary, sealed with the seal of the company, and acknowledged, is properly executed. *Hays vs. Galion Co.*, 29 O. S., 330.

## **BAR EXAMINATIONS**

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**A seal of a corporation is no longer necessary to the execution of a valid deed of its lands. Building & Loan Co. vs. Hughey; 16 O. C. C., 19.**

**(Procedure for the disposal of lands of a corporation formed to buy or sell real estate. Gen. Code, 8649.)**

**(b) National Banks are created and governed under the provisions of the "National Bank Act."**

**They are private corporations organized under a general law of congress, by individual stockholders, with their own capital, for private gain, and managed by officers, agents, and employes of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute, is of a general nature arising from their business relations to the public through individual citizens and not as direct representatives of the state as a body politic in exercising its legal and constitutional functions. Branch vs. U. S., 12 Ct. Cl. (U. S.) 281.**

**The minimum capital allowed is \$100,000, except that banks with a capital of not less than \$50,000 may, with the approval of the secretary of the treasury, be organized in any place the population of which does not exceed 6000 inhabitants, and with not less than \$25,000, with like sanction, in any place the population of which does not exceed 3000 inhabitants; no association shall be organized in a city of more than 50,000 population with a capital of less than \$200,000.**

**The corporate existence is twenty years and a bank may at any time within two years next previous to the expiration of that period, with the approval of the comptroller, extend its existence for another period of twenty years.**

**No less than five directors are required; they hold office for one year or until their successors have been elected and qualified; every director must, during his whole term of service, be a citizen of the United States; at least three fourths of the directors must have resided in the state, etc., in which the bank is located for at least one year immediately preceding their election; every director must own in his own right at least ten shares of stock (only five shares in banks whose capital stock does not exceed \$25,000); if a director becomes disqualified, his place is vacated. Share holders are individually responsible equally and ratably for the debts of the bank, to the extent of the amount of their stock therein at par value, in addition to the amount invested**

therein. Persons holding stock as executors, administrators, guardians or trustees are not liable as stockholders, but the assets and funds in their hands are so liable.

(c) The General Assembly shall pass no special act conferring corporate powers. Ohio Const., Art. XIII, Sec. 1.

Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Ohio Const., Art. XIII, Sec. 2.

(d) (1) By expiration of its charter, according to the weight of authority.

(2) By an act of the legislature repealing its charter, under the power of repeal reserved by the state in granting the charter.

(3) By the loss of an integral part which cannot be supplied, as by the death or withdrawal of all the members where there are no means of supplying their places.

(4) By surrender of its charter with consent of the state,

(5) By forfeiture of its charter for misuser or non-user of its powers.

Clark on Corporations, par. 82.

(See Gen. Code, 11928, et. seq.)

(e) The constitution of 1851 provides for the double liability of stockholders.

On November 3, 1903, the double liability was changed, by constitutional amendment, to single liability.

On September 3, 1912, the said amendment was amended so as to restore the double liability in the case of those corporations authorized to receive money on deposit. Lang vs. Osborn Bank, et al., 100 O. S., 51.

Question 463.

The Eagle Land Company, a corporation, organized under the laws of Ohio, to engage in the real estate business, for the purpose of stimulating a sale of lots in a subdivision, agreed to place the same price on the first 200 lots in said subdivision at the sum of \$500 each, and after 200 subscribers were obtained to allot the same to said subscribers by a drawing, each subscriber to take the lot drawn.

A subscribed in writing for a lot, but after the drawing, refused to complete the contract and pay for the same.

B also subscribed in writing for a lot, and after the drawing paid \$100 and gave his notes secured by mortgage

## **BAR EXAMINATIONS**

to said company for the balance of the purchase price, but refused to pay the subsequent payments as they fell due.

The Eagle Land Company brought suit against A to complete his contract, or pay the purchase price, and also brought suit for foreclosure against B for the balance due on purchase price.

Could A and B make any defense against said actions?

**Answer 463.**

A has a good defense against the action, the contract between him and the company being a gambling contract and void.

B has no defense against the action, against him, as the notes and mortgage signed by him, are separate and distinct contracts, from the illegal one in which his lot was awarded to him. "Gen. Code, 697, et. seq., providing for bond investment companies do not purport to legalize a lottery, and under our constitution, no act could do so. A corporation wherein shareholders pay in periodical dues and certain shareholders ascertained by lot are paid out in advance in full, is a lottery and illegal." *Shaw vs. Savings Co.* 5 O. N. P., 411; 8 O. D. (N. P.), 510.

If a lottery prize drawn by two is paid to one, the division to be made when they reached home, the illegality of the enterprise or of the partnership is no defense to the subsequent contract to divide. *Glock vs. Hartdegen*, 10 Dec. Rep., 769; 23 Bull., 283 (editorial).

Where a contract is dual in its nature, one part relating to the organization of an association alleged to be in restraint of trade and another and separable part relating to an agreement between the association and its selling agency, a claim of one of the members of the association against the common agent on an account stated for goods sold under the general agreement is enforceable at law. *McCausland vs. Akers*, 1 O. C. C., N. S., 108; 14 O. C. D., 711.

**Question 464.**

A number of lawyers living in Cleveland, Ohio, specializing in the practice of law, met together for the purpose of organizing a corporation whose principal business as set out in its application for a charter, "to defend physicians, dentists and lawyers from actions brought against them for mal-practice, and growing out of their professional duties." The application in due form was presented to the secretary of state, who refused to grant articles of incorporation. An action was then commenced in *Mandamus*

against the secretary of state to compel him to issue said articles. Could said action be maintained? Give reasons.

Answer 464.

The action could not be maintained.

Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons may lawfully associate themselves. Gen. Code, 8623.

A corporation, the sole business of which is that of defending physicians and surgeons against civil prosecution for malpractice, is a professional business, and expressly prohibited. State vs. Laylin, 73 O. S., 90; 76 N. E., 567.

Question 465.

The Midland Grocery Company employed Jones to drive its delivery wagon, and a part of his duty was to drive the wagon home each evening and put it away in his stable. Jones bought and sold potatoes on his own hook during the season, and would deliver them from the delivery wagon of the Midland Company during the day and on his way home from work. One day while coming home from work, and while delivering a barrel of potatoes from off the wagon, it slipped and struck a pedestrian on the sidewalk, breaking his leg. Smith brought suit against the company for damages. Could Smith recover? Give reasons.

Answer 465.

Smith is not entitled to recover damages against the company. The owner of an automobile is not liable in an action for damages for injuries to or death of a third person caused by the negligence of an employee in the operation of the automobile, unless it is proven that, at the time, the employee was engaged upon his employers business and acting within the scope of his employment.

The facts that the automobile was owned by the defendant and that the same was negligently operated by an employee do not make a prima facie case of negligence against the owner, unless it appears that the employee was driving the automobile with authority, express or implied, of the owner. Coal Co. vs. Rivieux, Admx., 88 O. S., 18.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

**CORPORATIONS**

**Question 466.**

(a) If you pass this examination and are admitted to practice, can you and other attorneys form a corporation for the general practice of law? Why?

(b) With what word must the name of a corporation for profit begin and end?

(c) How may corporations, generally, be served with summons in Ohio?

**Answer 466.**

(a) Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves. Ohio Gen. Code, 8623.

"A foreign corporation which is formed for the purpose of professional business cannot be admitted to do business in this state." State ex. rel., Laylin, 73 O. S., 90.

(b) The name of the corporation, which, unless it is not for profit, shall begin with the word "the" and end with the word "company," except as otherwise provided by law. Ohio Gen. Code, 8625-1.

(c) A summons against a corporation may be served upon the president, mayor, chairman or president of the board of directors or trustees, or other chief officer; or if its chief officer be not found in the county, upon its cashier, treasurer, secretary, clerk or managing agent; or, if none of such officers can be found, by a copy left at the office or usual place of business of the corporation with the person having charge thereof. Ohio Gen. Code, 11288.

**Question 467.**

(a) What do you understand by "Public Service Corporation?"

(b) Is such a corporation Public or Private?

(c) Has such a corporation the power of eminent domain?

(d) What duty does such a corporation owe the public?

**Answer 467.**

(a) A public service or quasi public corporation is one

private in its ownership, but which has an appropriate franchise from the state to provide for a necessity or convenience to the general public, incapable of being furnished by private competitive business, and dependent for its exercise on eminent domain or governmental agency. Attorney Gen. vs. Haverhill Gaslight Co., 215 Mass., 394; 101 N. E. 1061; Ann. Cas. 1914, C. 1266.

(b) Such a corporation is properly termed a Quasi Public corporation, it being a private corporation with public duties to perform. Clark on Corporations, p. 31.

(c) They usually possess the right of eminent domain. Clark on Corporations, p. 28.

(d) The nature of their business constitutes them quasi public servants, and as such they are bound to serve the public on reasonable terms and with impartiality. Clark on Corporations, p. 32.

Question 468.

(a) Ten of your clients call at your office and inform you that they have agreed to put in \$10,000 each in the business of manufacturing and selling stoves and ask your advice whether they should form a corporation or partnership. You advise them to form a corporation. Give three reasons why you should so advise.

(b) May a corporation be formed in Ohio for the purpose of building and also operating a railroad, and also to manufacture and sell surgical instruments? Why?

Answer 468.

(a) 1. A corporation (generally) has perpetual existence, irrespective of the death of any of its constituent members, while a partnership is dissolved by death of a member.

2. The liability to creditors of the share holders in a corporation is limited, while the liability to creditors of a partner is ordinarily in solido.

3. Shareholders in a corporation can freely transfer their interests between themselves and to others; while, owing to the doctrine of delectus personarum applying to partnerships, a transfer of a partner's interest would effect a dissolution of the firm.

(b) Such a corporation cannot be formed.

"Except for carrying on professional business, a corporation may be formed for any purpose for which natural persons lawfully may associate themselves." Ohio Gen. Code; 8623.



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"The word **PURPOSE** is intentionally in the singular number in this section, and a corporation cannot be formed for two or more distinct purposes in the absence of specific statutory authority, although it might be formed for each of such purposes separately," *State ex rel. vs. Taylor*, 55 O. S., 61.

### Question 469.

The A. B. Company, a corporation, is formed for "the purpose of owning clay deposits, mining clay, manufacturing and selling sewer pipe." After ten years the clay deposits owned by said company become exhausted and it is no longer profitable to manufacture and sell sewer pipe. Thereupon all the directors and a three-fourths majority of all stockholders agreed and determined to discontinue the manufacture of sewer pipe and to commence and prosecute the business of a canning factory. One dissatisfied stockholder thereupon commences a suit in common pleas court asking an injunction restraining said company and the directors thereof, from converting said business into a canning factory. What decision? Why?

### Answer 469.

The stockholder is entitled to the injunction asked for. "No corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose than to accomplish the legitimate object of its creation." Ohio Gen. Code, 8684.

### Question 470.

The A. B. Company is regularly incorporated under Ohio laws with a capital stock of \$200,000 divided into 2,000 shares of \$100 each, 1,000 shares Preferred stock and 1,000 shares of Common stock. Written in the certificate of the Preferred stock is a stipulation that such Preferred stock shall receive eight per cent dividend payable annually. Each purchaser of Preferred stock is given one share of Common stock as a bonus for each share of Preferred stock so purchased. The Company commences and prosecutes its business for five years; the Company becomes insolvent over and above its assets, \$50,000. You represent a creditor claiming \$10,000. What, if any, remedy has he, and how would you proceed?

### Answer 470.

The creditor has a right to have a receiver appointed for the corporation, and to have the receiver collect, by suit or otherwise, the par value of the Common stock which was

given to the purchasers of the Preferred stock as a bonus.

"By the weight of authority, in the absence of constitutional or statutory prohibition, where a corporation issues stock gratuitously, or under an agreement by which the holder is to pay less than its par value, either in money or in property or services.

(a) The transaction is binding upon the corporation.

(b) It is binding as against stockholders who participate or acquiesce therein.

(c) But it is a fraud upon dissenting stockholders, and they may sue in equity to enjoin or cancel the issue.

(d) If the stock is original stock, issued on subscription, the transaction is a fraud upon creditors of the corporation, who deal with it on the faith of the stock being full paid; and, if the corporation becomes insolvent, the original holders of such stock, and purchasers of the stock with notice, may be held liable for its par value to pay such creditors." Clark on Corporations, p. 146.

## OHIO STATE BAR EXAMINATION

JUNE, 1919

### EQUITY

#### Question 471.

A surviving partner gave partnership notes for a firm debt and executed a mortgage on certain real estate as security. Suit in equity to foreclose was brought against him and the heirs and administrator of his deceased partner. It turned out in the hearing that the real estate described in the mortgage had never belonged to the partnership. The lower court thereupon denied plaintiff the foreclosure of the mortgage but entered judgment for the amount of the notes.

State, with reasons, whether the court's action was correct.

#### Answer 471.

The court's action was correct.

The mortgage is void on account of the lack of authority in the partner to bind the land.

"The partnership is liable for a note given for a firm debt, as the remaining partner had authority to sign the firm name." *Middletown Lumber vs. Martin*, 10 O. App., 188.

The heirs of the deceased partner should be dismissed as parties defendant.

#### Question 472.

A trust is created by proper instrument, but no trustee is named in such instrument. In such event will the trust fail? Give reasons.

#### Answer 472.

The general rule is that no trust will fail for want of a trustee.

General Code 10596 provides for the naming of testamentary trustees by the probate court where the will names no trustees, or where the trustee named dies, declines to accept, resigns, becomes incapacitated, or is removed.

"No trust fails for want of a trustee, except where the nature of the duty is such that it cannot be performed by another.

Where a trust is created by a will, and the judgment and discretion of the trustee named are absolutely essential to the creation of the trust, in case of the death or incapacity of the trustee, the trust will fail." *Rogers vs. Rea Trustee*, 98 O. S., 315.

## OHIO SUPREME COURT

Question 473.

A entrusts B with money with which to purchase land for him. B buys the land, but takes the title in his own name. A files suit in equity to compel B to convey to him the land, or to have the court decree that B holds the title in trust for him.

B defends on the ground that the contract or transaction between himself and A was not evidenced by any writing. Is B's defense good? Why?

Answer 473.

No. A resulting trust is created. The statute of frauds cannot be availed of in equity to perpetrate a fraud.

"If B, having A's money to invest in land, takes the title in his name, he and his heirs after his death hold in trust for A." *Williams vs. Van Tuyl*, 2 O. S., 336; 1 Longs. Notes, 1057; *Reynolds vs. Morris*, 17 O. S., 510; 11 Longs. Notes, 847.

A bought B's property at sheriff's sale pursuant to an agreement to buy for joint benefit. A had in his possession property of B sufficient to pay his share, which was to be and was, converted into money to be so applied. It was held that a resulting trust arose. The statute of frauds did not apply, and B was entitled to have the contract enforced and a trust declared and a conveyance of an undivided one-half interest. *Turpie vs. Lowe*, 4 O. C. C., 599; 2 O. C. D., 729.

It is well settled that parol evidence is admissible both to create and to rebut the presumption of a resulting trust. *Bispham on Equity*, Sec. 83.

Question 474.

Give five maxims of Equity.

Answer 474.

1. No right without a remedy.
2. Equity follows the law.
3. Equity comes to the diligent, not to the sleeping.
4. Between equal equities, the law will prevail.
5. Equality is equity.
6. He who comes into equity must do so with clean hands.
7. He who seeks equity must do equity.
8. Equity looks upon that as done which ought to be done.
9. Between equal equities priority of time will prevail.

## BAR EXAMINATIONS

10. Equity imputes an intention to fulfill an obligation.
11. Equity acts in personam.
12. Equity acts specifically. Bispham on Equity, Chap.

III.

Question 475.

Are the following actions at law or in equity?

- (a) For foreclosure of mortgage.
- (b) For judgment on an account.
- (c) For an accounting.
- (d) For a writ of mandamus.
- (e) For an injunction.

Answer 475.

- (a) Equity.
- (b) Law.
- (c) Equity.
- (d) Law (Statutory in Ohio.)
- (e) Equity.

Question 476.

A and B, while in Kentucky, enter into a binding written contract by which A agrees to sell and convey to B his bluegrass farm near Lexington, for \$25,000. A subsequently moves to Ohio and then refuses to carry out his contract. B commences an action to compel the specific performance of the contract and gets personal service upon A. A objects to the jurisdiction of the Ohio court. Should his objection be sustained? Give reasons.

Answer 476.

A's objection should be overruled.

An action to compel the specific performance of a contract for the sale of real estate may be brought either in the county where the subject of the action is situated, or where the defendants, or any of them, reside. If the court has acquired jurisdiction over the persons of the parties, such a contract may be enforced in relation to land situated in another state. Gen. Code, 11270.

A court of equity, having jurisdiction over the persons of the parties may enforce specific performance of a contract for the sale of land situated in another state. *Barnley vs. Stevenson*, 24 O. S., 474; *Penn. vs. Hayward*, 14 O. S., 302.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### EQUITY

#### Question 477.

A contracted in writing to sell his farm to B for a cash payment of \$5,000 and balance in two installments with mortgages to secure them.

At date of signing contract A paid the \$5,000 as agreed. On date fixed in contract for delivery of deed, A refused on the ground that he had applied a part of the \$5,000 in payment of a former claim he held against B, and that B must make that up to him before he would carry through the deal.

Can B enforce the contract, and how? Suppose before the day of passing the papers fixed in contract, A had sold the land and conveyed it to another. What relief, if any, can B seek and obtain?

#### Answer 477.

B can enforce the contract, by filing bill in equity for specific performance. A has no right to apply any part of the \$5,000 paid on the former claim he held against B.

If A, before the passing of the papers fixed in the contract, has sold the land to a bona fide purchaser, who paid value, and who had no notice of B's rights, B would be relegated to his action at law against A; to-wit, for the recovery of the \$5,000 and damages for the breach of the contract.

"When a binding agreement is entered into to sell land, equity regards the vendor as trustee of the legal title for the benefit of the vendee, while the latter is looked upon as trustee of the purchase money for the benefit of the former. Hence the purchaser has the right to the aid of the chancellor for the purpose of obtaining a conveyance of the legal title to the property of which he is the equitable owner; while, as all remedies ought to be mutual, the vendor can invoke the same aid for the purpose of compelling the buyer to accept a conveyance, and pay the purchase money. If the contract has been partly performed by the vendee's going into possession or paying the purchase money, the equity of both parties is, of course, still stronger." *Bishpam on Equity, Par. 364.*

## BAR EXAMINATIONS

A vendor who has entered into a contract for the sale of realty is said to be a trustee of the legal estate for the purchaser as soon as the contract of sale is completed. 17 O. N. P., N. S., 813.

Question 478.

Pickets stationed by a labor union near the entrance of A's place of business, when A's employes were on strike, impeded the entrance of patrons, in trying by arguments and statements to dissuade such patrons from entering, resulting also in collecting crowds on the sidewalk in front of the business place.

In what manner, if at all, can a court afford relief to A?

Answer 478.

By granting an injunction against the persons picketing.

"Where there is interference with property rights and where the continuance of such interference will result in irreparable damage or a multiplicity of suits, a court of equity will intervene by injunctive process and its jurisdiction is not destroyed by the fact that if the threatened offenses were committed they would amount to violation of the criminal law." *Garment Co. vs. Garment Workers' Union*, 15 O. N. P., N. S., 353.

While peaceable picketing will not be enjoined, the use of an excessive number of pickets will be enjoined especially if the evidence shows that threats of injury have been made by them to the workmen. *Foundry Company vs. Moulders' Union*, 20 O. N. P., N. S., 161.

Question 479.

A held a note against B secured by mortgage on B's home, both dated January 23, 1897. On October 12, 1911, A sued on the note and recovered judgment for the full amount. February 15, 1918, A brought suit to foreclose the mortgage and to secure sale thereof to satisfy the judgment. What defense, may be interposed and on what principle?

Answer 479.

The statute of limitations is a defense.

"A mortgage is a specialty, and an action for its foreclosure and sale of the premises comes within the provisions of G. C. 11221 and the statute of limitations is fifteen years, unless extended by G. C. 11223 (partial payment, written acknowledgment, etc.) *Kepp vs. Lydecker*, 51 O. S., 240; 14 Longs. 540.

## OHIO SUPREME COURT

**Question 480.**

What is the general test to which you submit the facts in a proposed action by which you decide whether to seek a legal or an equitable remedy?

**Answer 480.**

Whether or not there is a clear, adequate and complete remedy at law. If there is, the suit must seek a legal remedy for equity will not relieve under these circumstances. *Gott vs. Schultze Co.*, 12 O. N. P., N. S., 206; *Steele vs. Worthington*, 2 O., 182; I Longs. Notes, 115; *Nicholson vs. Pim*, 5 O. S., 25; II Longs. Notes, 152; *Miller vs. Longacre*, 26 O. S., 291; III Longs. Notes, 305; *Stevens vs. Times Star*, 72 O. S., 112; IV Longs. Notes, 988.

**Question 481.**

Name five of the most common causes of action that are termed actions in equity.

**Answer 481.**

Injunction, Specific Performance, Accounting, Interpleader and Receivership.

**Question 482.**

A in a fraudulent trade induced B to convey real estate to C a confederate in the fraud. The deed to C was not recorded. A sold the property to X who knew nothing about the fraud and prevailed on B, who was then questioning the good faith of his deal with A, after destroying the unrecorded deed and without reconveyance from C to B, to convey to X by deed imperfectly executed and not acknowledged B brought suit against X to recover his realty.

The court of Common Pleas held for B. Should this finding be sustained? Why?

**Answer 482.**

The finding is not correct.

"A deed which is executed in compliance with G. C., 8510, which is not filed for record in compliance with G. C., 8543, is good as against all but subsequent grantees for value and without notice." *Irwin vs. Smith*, 17 O. S., 226; I Longs. Notes, 808; *Wright vs. Bank*, 59, O. S., 80 IV. Longs. Notes, 759.



## BAR EXAMINATIONS

The destruction of a deed after delivery and before it is recorded, with the intent to revest the title, does not operate as a reconveyance of such title as between the parties or those who have knowledge of such transaction. *Dukes vs. Spangler*, 35 O. S., 119; III Longs. Notes, 764; *Jefferson vs. Philo*, 35 O. S., 173; III Longs. Notes, 770; *Spangler vs. Dukes*, 39 O. S., 642; III Longs. Notes, 1056.

A deed which is intended to convey the legal estate, but which is so defectively executed as not to pass the legal title, is, in equity, treated as at least equal to a contract to convey and for many purposes is considered as an actual conveyance between the parties, and those claiming as volunteers or purchasers with notice, and equity will decree as though the conveyance had been executed by the parties, in the time and at the time intended or agreed. *Barr vs. Hatch*, 3 O., 527; I Longs. Notes, 192.

Where a grantee obtains a deed of land by the fraud of his confederate E, upon the grantor H and does not have the same recorded and the land is afterward sold by the grantee for a valuable consideration to a bona fide purchaser, W, who has no knowledge of the fraud; and where instead of a deed from the grantee to W, the grantor H, without a reconveyance to him of the land, cancels the unrecorded deed made by him, and with knowledge of the fraud which has been practiced on him, makes a new deed to W, signed and sealed in the presence of one witness and not acknowledged, and delivers the same to the confederate E to be by him delivered to W, who on the faith thereof parts with the consideration, he will be estopped from disputing the title or claim of W to the land.

The maxim "He who is first in time is stronger in right" does not prevail when the equity, junior in date, is superior in merit. *Wilson vs. Hicks*, 40 O. S., 418; 4 Longs. Notes, 35.

# OHIO STATE BAR EXAMINATION

JUNE, 1920

## EQUITY

Question 483.

- (a) Define fraud.
- (b) Constructive Fraud.
- (c) Injunction.

Answer 483.

(a) While the general significance of this word is easily understood, and indeed, requires no explanation, it is, nevertheless difficult to give any satisfactory definition of it in a single sentence, for the simple reason that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundaries, lest some new artifice, not thought of before, might enable a wrongdoer to escape from the power of equitable redress. "The Court," said Lord Chancellor Hardwicke in *Lawley vs. Hooper*, decided in 1745, "very wisely hath never laid down any general rule beyond which it will not go, lest other means for avoiding the equity of the court should be found out." *Bispham on Equity*, Par. 197.

Fraud is a false representation of fact, made with a knowledge of its falsehood, or in reckless disregard whether it be true or false, with the intention that it should be acted on by the complaining party, and actually inducing him to act upon it. *Anson on Contracts*, p. 199.

(b) Constructive Fraud is fraud which is inferred from the nature of the transaction or the relations of the parties and which is therefore known as "presumptive" or "constructive" fraud. The celebrated division of fraud by Lord Hardwicke is as follows:

1. Fraud arising from the facts and circumstances of imposition.
2. Fraud arising from the intrinsic matter of the bargain itself.
3. Fraud presumed from the circumstances and condition of the parties contracting; and
4. Fraud affecting third persons not parties to the agreement.

The first of these subdivisions embraces cases of actual fraud; the second and third include instances of constructive fraud; and the last has relation to third parties whom the fraud may affect. *Bispham on Equity*, Par. 205.

## BAR EXAMINATIONS

(c) An injunction in its legal sense is a writ remedial, issuing by order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. Bispham on Equity, Par. 399.

Question 484.

What is meant by interpleader?

Answer 484.

A Bill of Interpleader is a bill filed in equity to protect a party who is liable to discharge some debt, duty or obligation, from suits by two or more persons severally claiming to be entitled to the benefit of such debt, duty or obligation. Bispham on Equity, Par. 419.

Question 485.

Under what circumstances ordinarily will damages be decreed by a court of equity?

Answer 485.

Where the suitor in equity cannot obtain an equitable remedy which will furnish exact justice, as when the execution of a decree for specific performance or for an injunction has become impossible, the question arises: Is the complainant's bill to be dismissed, or is any relief to be afforded him by way of compensation?

The tendency of courts of equity in this country is somewhat in favor of affording relief in proper cases by compensation. Bispham on Equity, Par. 476.

Where there is no equity in the bill, to the knowledge of the complainant, the court will not retain the case to assess damages. 25 O. C. C., N. S., 95.

Question 486.

Give the Maxims of Equity.

Answer 486.

1. No right without a remedy.
2. Equity follows the law.
3. Equity comes to the diligent, not to the sleeping.
4. Between equal equities, the law will prevail.
5. Equality is Equity.
6. He who comes into equity must do so with clean hands.
7. He who seeks equity must do equity.
8. Equity looks upon that as done which ought to be done.

9. Between equal equities priority of time will prevail.
10. Equity imputes an intention to fulfill an obligation.
11. Equity acts in personam.
12. Equity acts specifically: Bispham on Equity, Chapter III.

Question 487.

What are the grounds for reforming a written instrument?

Answer 487.

Because through mistake or fraud, the instrument has not been so drawn as to express the true intention of the parties, and to enforce it in its existing condition would be simply to carry out the very mistake or fraud complained of; while to set it aside altogether might deprive the plaintiff of the advantages of a contract to which he is lawfully entitled. Bispham on Equity, Par. 468.

Question 488.

The petition avers that the defendant ever since the 16th day of March, 1916, continued to gather, purchase, traffic in, and otherwise take possession of the bottles of the plaintiff, that he threatens to and will, unless restrained by the court, continue to gather, purchase, traffic in and take possession of said bottles and will sell and otherwise dispose of the same; that the plaintiff has suffered and will continue to suffer great and irreparable damages; that it has no adequate remedy at law; that it will be put to a multiplicity of suits in order to recover its property unless the defendant be restrained by the court.

To this petition the defendant filed a demurrer on the ground that the averments of the petition if proven are punishable under the criminal acts of this state, and that an injunction is not the proper remedy to compel obedience to the criminal laws of the state. The court overruled the demurrer.

(a) Did the court err?

(b) Why?

Answer 488.

(a). The ruling of the court on the demurrer was correct.

(b) Where the averments of a petition would, if proven, entitle the plaintiff to an injunction, a writ will not be refused merely because the acts sought to be enjoined are punishable under the criminal statutes of this state. Renner Brewing Co. vs. Rolland, 96 O. S., 432.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**EQUITY**

**Question 489.**

- (a) Define Equity.
- (b) What is meant by Equity Jurisprudence?
- (c) Give the distinction between Law and Equity.

**Answer 489.**

(a) Equity is defined by Bispham as that system of jurisprudence which was administered by the High Court of Chancery in England in the exercise of its extraordinary jurisdiction.

Story defines Equity as that system of jurisprudence which affords a remedy where there is no plain, complete, and adequate remedy at common law.

(b) By Equity jurisprudence is meant that system of administering justice in three general classes of cases; the first embracing those cases in which the common law courts do not recognize a TITLE; the second, those in which the common law courts do not recognize a RIGHT; and the third, those cases in which the common law courts cannot ENFORCE a right, or cannot ENFORCE IT SO AS TO DO COMPLETE AND EXACT JUSTICE. Bispham on Equity, Chap. 2 Par. 16.

(c) Law as distinguished from equity denotes the doctrine and procedure of the common law of England and America, from which equity is a departure. The common law of England was confined to a very few forms of action, and the relief granted could not extend further than recovery of money damages or specific recovery of real or personal property. Equity as distinguished from law is a system of jurisprudence providing a system of titles, rights and remedies where the common law by reason of its universality, fails to afford relief.

**Question 490.**

Give ten Maxims of Equity.

**Answer 490.**

1. No right without a remedy.
2. Equity follows the law.
3. Equity aids the diligent, not the sleeping.

4. Between equal equities the law will prevail.
5. Equality is equity.
6. He who comes into equity must do so with clean hands.
7. He who seeks equity must do equity.
8. Equity looks upon that as done which ought to be done.
9. Between equal equities priority of time will prevail.
10. Equity imputes an intention to fulfill an obligation.
11. Equity acts in personam.
12. Equity acts specifically

Question 491.

(a) What principal subjects come under the jurisdiction of Courts of Equity?

(b) What allegations are necessary in a petition for injunction to bring the subject-matter within the jurisdiction of a Court of Equity?

Answer 491.

- (a) 1. Equitable titles consist of trusts, mortgages and assignments.
2. Equitable rights include relief against accident, mistake, fraud, etc.
3. Equitable remedies include specific performance, injunction, cancellation, rescission, reformation, etc.

(b) The necessary allegations are that the plaintiff will be irreparably injured in case the injunction is not granted, and that the plaintiff has no adequate remedy at law.

Question 492.

(a) What is a trust?

(b) How many kinds of trusts are known under the law?

(c) Give an illustration of each kind.

(d) What elements are necessary to be present to create a trust?

Answer 492.

(a) A trust in its technical sense, is the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title of which is in another.

(b) Trusts are divided into two general classes: Express and Implied. Express trusts being those which are created by the language of the parties and Implied trusts

## BAR EXAMINATIONS

those which are created by the rules of Equity from the facts and circumstances surrounding the transaction.

(c) Where a testator conveys Blackacre to A in trust for the benefit of the testator's children the income to be used for their support and education, the testator has created an express trust.

Where a trustee having in his possession money which belongs to the trust fund, purchases property therewith, and takes title in his own name, equity will decree that he holds the property in trust for the beneficiaries of the trust.

(d) There are three elements necessary:

1. Sufficient words which indicate an intention to, and actually do, sever the legal from the equitable title.
2. A definite subject matter.
3. A definite object.

Question 493.

(a) Define fraud.

(b) Into what four classes has fraud been divided?

(c) A, needing some money, calls on B who agrees to furnish the amount required, but instead of taking a mortgage to secure the amount, demands a deed, which A gives him, and which deed is absolute on its face, but A has a verbal agreement with B that upon repayment of the loan he will reconvey the property.

A offers to repay the loan, but B refuses to reconvey. What remedy, if any, has A against B? and how will a Court of Equity construe the deed from A to B?

Answer 493.

(a) Bispham on Equity states that it is difficult to give a satisfactory definition of fraud in a single sentence, for the simple reason that courts of equity have always avoided circumscribing the area of their jurisdiction in such cases by precise boundary. However, the essential elements of a fraud are: a statement made, with knowledge of its falsity, or with reckless disregard as to whether it is true or false, made with intention to be acted upon by another party; and is acted on by the other party, to his damage.

(b) 1. Fraud arising from facts and circumstances of imposition.

2. Fraud arising from the intrinsic matter of the bargain itself.

3. Fraud presumed from the circumstances and relations of the parties contracting.

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4. Fraud affecting third persons not parties to the agreement.

(c) A is entitled to have the agreement made by B to reconvey specifically performed, upon the payment to B of the amount loaned. The court can order such reconveyance or can decree the deed to be a mortgage and order the same cancelled on the records. A deed absolute with a contract for reconveyance will be construed to be a mortgage if the equities of the case require it, or the language justifies it. *Johnson vs. Kembergh*, 18 O. C. C., N. S., 553.



## OHIO STATE BAR EXAMINATION

JUNE, 1921

### EQUITY

#### Question 494.

(a) What is meant by the term "adequate remedy at law?"

(b) Name five practical applications of the maxim "Equality is equity."

#### Answer 494.

(a) Equity will not interfere where there is "an adequate remedy at law." The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances. *Bispham on Equity*, Par. 37.

(b) 1. Where a donee of a power in trust has the option to select out of a class, and there is more than one intended beneficiary, and the donee has failed to exercise the power.

(2) Where parties contribute funds to purchase property, jointly, the presumption is against the right of survivorship.

3. Division of the proceeds in a sale in partition, or where the partition is in kind, awarding owelty of partition.

4. In marshalling of liens, proportionate division between lien holders of the same class.

5. Contribution between co-sureties.

#### Question 495.

(a) Name the equitable remedies among the following and define them: Mandamus, Prohibition, Accounting, Habeas Corpus, Injunction, Rescission, Divorce, Quo Warranto, Discovery, Reformation.

(b) Does the statutory remedy in Partition oust the old chancery remedy?

#### Answer 495.

(a) **ACCOUNTING** is the equitable remedy applied when the state of accounts between the parties is complicated and intricate, or is involved with third parties, when to do justice requires methods of investigation peculiar to

courts of equity, and when it would be very difficult for a jury to unravel the numerous transactions. Bispham on Equity, Par. 484.

**INJUNCTION** in its legal sense, is a writ remedial, issuing by the order of a court of equity, and commanding a defendant to perform some act, or restraining a defendant from the commission or continuance of some act. Bispham on Equity, Par. 399.

**RECISSION** is a right of a complainant, and not a means for the assertion thereof; it is an equity, rather than an equitable remedy. It is a right enforced in equity, in certain cases of fraud and mistake, where the proper redress which ought in justice to be afforded to the injured party is that the transaction into which he has entered should be set aside and the written evidence thereof surrendered or destroyed. Bispham on Equity, Par. 472.

**DISCOVERY** is an equitable remedy in aid of legal proceedings. At common law, no means existed by which the opposite party could be compelled to testify as to the matters in dispute, nor by which the production of documents in his possession could be enforced. This could be done by a suit in equity seeking this remedy.

Discovery is now obsolete, on account of the adequacy of the statutory remedies for the same purpose. Bispham on Equity, Par. 556.

**REFORMATION** (or correction, as it is sometimes called) is the equitable remedy by means of which a written instrument is made to conform to the intention of the parties, and is then enforced in its corrected shape. Bispham on Equity, Par. 468.

(b) It does not.

It is the province of equity to deal with the rights of parties upon principles of natural justice, and when the right ought to be enforced, is clearly just and contravenes no statute, the want of a precedent should not prevent a court from doing what seems to be exact and equal justice between the parties. Therefore the court permits an action in partition to be maintained in equity, where the subject of partition was personal property, *Martin vs. Eaton*, 18 O. C. C., N. S., 300.

Question 496.

(a) The plaintiff and defendant are both residents of Franklin county, Ohio. In his petition, in the court of Common Pleas of that county, the plaintiff avers that under the terms of a written contract duly executed, the defend-

## BAR EXAMINATIONS

ant had agreed to convey to him certain lands, in the State of Indiana, and prayed for a decree for specific performance of the contract. To this petition the defendant demurs on the ground that the court has no jurisdiction of the subject of the action. Should the demurrer be sustained or overruled?

- (b) Give reason for answer.

**Answer 496.**

- (a) The demurrer should be overruled.

(b). An action to compel the specific performance of a contract for the sale of real estate may be brought either in the county in which the subject of the action is situated, or where the defendants or any of them reside. If the court has acquired jurisdiction over the persons of the parties, such a contract may be enforced in relation to land situated in another state. Gen. Code, 11270.

A court invested with general chancery powers in this state may decree specific performance of agreements to convey lands lying in another state, where all the parties, still bound by the agreement, are within the jurisdiction of the court, and have been served with its process. Penn vs. Hayward, et al., 14 O. S., 302.

**Question 497.**

(a) To the petition of a railroad company asking for an injunction against ticket-scalpers from fraudulently dealing in non-transferable tickets issued for a special occasion, the defendants answered that the tickets were issued by plaintiff under a combination agreement with other railroads to unlawfully suppress competition.

Does this answer state a defense?

- (b) Why?

**Answer 497.**

- (a) The answer does not state a defense.

(b). The maxim "He who comes into equity must come with clean hands," requires only that the plaintiff must not be guilty of reprehensible conduct with respect to the subject matter of this suit. Kinner et al. vs. L. S. & M. S. Ry. 69 O. S., 339; IV Longs. 958.

**Question 498.**

State all the remedies, legal and equitable, that a plaintiff would have in the following cases:

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(a) Upon refusal of defendant to convey real estate under terms of a valid contract in writing.

(b) Upon refusal of defendant, who is an operatic star, to sing under a valid contract, having entered into another contract with another manager to sing for the latter at the same time as for the plaintiff.

(c) Upon refusal of defendant to deliver an heir-loom on a valid contract.

(d) Upon defendant's maintaining a continuous private nuisance near plaintiff's residence.

(e) Upon fraudulent representations made by defendant in the sale and conveyance of real estate to plaintiff by deed.

### Answer 498.

(a) Damages and Specific Performance.

(b) Damages and Injunction against appearances elsewhere.

(c) Damages and Specific Performance. (See Bispham on Equity, p. 368.)

(d) Damages and Injunction.

(e) Rescission, Cancellation and Damages.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1921

### EQUITY

Question 499.

(a) Give a state of facts that would require the court to apply the doctrine that one who comes into equity must come with clean hands.

(b) Illustrate in the same way the maxim "*Qui prior est tempore potior est jure.*"

Answer 499.

(a) Where a tort has been committed by joint tort feasons, intentionally and voluntarily, and one of the tort feasons, having been compelled to pay damages to the injured person, brings an action against the other tort feasons for contribution. This action cannot be maintained because of the principle embodied in this maxim.

(b) He who is prior as to time, is the stronger in the law."

Where A makes a binding contract to convey land to B, and afterward A makes a binding contract to convey the same land to C, upon separate suits against A by B and C for specific performance, B must prevail because of this maxim.

Question 500.

On August 1, 1921, Merrick, a well known aviator, contracted with the Dayton Wright Monoplane Company, to give six exhibition flights of his Dayton Wright Monoplane for the benefit of the company within six months from the date of the contract at times and places to be designated by him and for his convenience. As part of this contract, Merrick also agrees not to use or demonstrate any other aeroplane than the Dayton Wright Monoplane within a year. He receives \$1,000 cash upon signing the contract, and he is to be paid \$500 for each flight that he makes pursuant to it. On October 3, 1921, Merrick notifies the Dayton Wright Monoplane Company that he will make the six flights under his contract at McCook Field, Ohio, during November and December, where he has contracted with the Acme Film Company to give some exhibition flights to produce films for moving pictures under a contract which

## OHIO SUPREME COURT

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stipulates that those photographs and films shall not be exhibited except in the theaters of the Acme Company. Merrick's contract with the Film Company also provides that he shall use a Pfalz Biplane for the picture films at that time.

Advise Dayton Wright Company as to its rights, and why.

### Answer 500.

The Dayton Wright Company has a right to an injunction against Merrick, enforcing the negative covenant in the contract-to-wit—restraining Merrick from using or demonstrating any other aeroplane than the Dayton Wright Monoplane within the year covered by the contract.

"The remedy by injunction to restrain the breach of negative covenants may be said to furnish the complement to the relief by specific performance." Bispham on Equity, Par. 461.

"The leading authority upon this subject, so far as covenants to render personal service are concerned, is Lumley vs. Wagner.

There the defendant had entered into an engagement with the plaintiff to sing at his theatre, and not to sing at any other theatre; and an injunction was granted by Lord St. Leonards restraining her from singing at any other theatre. It was held in that case, overruling former decisions, that the circumstances that the court would have been unable to enforce specifically the defendant's affirmative covenant to sing, did not affect the complainant's right to an injunction to restrain a violation of the negative covenant." Bispham on Equity Par. 462.

### Question 501.

On November 1, 1921, Bradley, who was the owner of the Bradley Building in Xenia, Ohio, contracted in writing to sell the property to Collins for \$100,000 and to convey the same to him by warranty deed on or before December 1, 1921. On November 1st, Collins paid \$1,000 cash on account of the purchase price, and agreed to pay the balance on or before December 1st, if the title was found to be satisfactory to his attorney. The building was insured with the Columbus Fire Insurance Company for \$100,000 under a policy that expired on November 15, 1921. On November 20th, Collins wrote Bradley that his attorney had found the title satisfactory and that he would be ready to pay the money and accept the deed on December 1st. On November

25th, the building was totally destroyed by fire, and Collins thereupon refused to complete the contract.

What, if any, remedy has Bradley, and why?

**Answer 501.**

Bradley has a right in equity to compel Collins to specifically perform the contract.

The leading case on the subject is *Paine vs. Meller* (6 Vesey 349; English Chancery Reports), a decision by Lord Eldon. This was a suit for specific performance. The contract was made on September 1 for a conveyance at Michaelmas. (Michaelmas term is from Nov. 2 to Nov. 25.) Owing to the seller's failure to make out a good title, the conveyance was not made then, but on December 16th, or 17th, the parties continued treating with each other, and there was evidence that the defect in title was remedied to the buyer's satisfaction. On December 18th the house was burned. Lord Eldon held that if the purchaser had accepted the title he was bound to complete the purchase, but otherwise not.

As the time for performance had passed, owing to the vendor's default, the purchaser could clearly not be compelled to take the property unless this default was waived, and it was for this reason that Lord Eldon made the question turn on the acceptance of the title. His language makes his view clear; "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his; they may be assets; and they would descend to his heir." Williston on Contracts, Vol. 2, Sec. 931 (Published 1920.)

The law of the United States if not of England may yet, as the law of the continent of Europe ultimately has done, discard a law of risk fundamentally inconsistent with that of the mutual dependency of bilateral promises. *Id.* Vol. 2, Sec. 933.

As to the application of the insurance money, if policy was valid and subsisting at the time of loss, see *Gilbert & Ives vs. Port*. 28 O. S., 276.

**Question 502.**

Perkins was married to one of Bryant's daughters and the couple were living with Bryant, who is a widower, on his farm Whiteacre. Bryant promised them orally that if they would continue to live there and take care of him, he

would give them a deed to Whiteacre. Bryant also tells Perkins that if he will improve and cultivate his adjoining farm. Blackacre, he will sell it to him after five years at the tax valuation. Perkins thereupon improves and cultivates Blackacre and continues, with his wife to live with Bryant at Whiteacre for six years when Bryant dies intestate without having conveyed either of the farms. Bryant's heirs refuse to convey either tract and Mr. and Mrs. Perkins consult you as to whether they can compel conveyance of either or both of the farms by reason of Bryant's oral promises.

How would you advise them, and why?

Answer 502.

Mr. and Mrs. Perkins have no right to compel the conveyance of Whiteacre to them.

"W. agreed with H that if he would render her certain services she would, in compensation thereof, make a will giving him all the property she owned at the time of her death.

HELD—that the agreement of W to compensate H for his work by will, was within the statute of frauds, and that no action could be maintained thereon for specific performance or for damages." Walters Adm'r. vs. Heidy, 19 O. C. C., N. S., 252.

Mr. and Mrs. Perkins have a right to compel the conveyance of Blackacre to them.

"If the plaintiffs were promised by the defendants a conveyance of the land upon condition that they make improvements and expended money thereon, and that they were put into possession of the premises under such promise, and have made improvements and expenditures upon which the promise was conditioned, the defendants would be estopped from refusing to make good their part of the promise." Schroeder vs. Schultz, 24 O. C. C., N. S., 268; Affirmed without opinion, 68 O. S., 690.

Question 503.

Taylor and his wife have been separated and living apart for several years when Taylor falls sick and is confined to his bed. His wife visits him shortly before his death, and without his knowledge, while she is at his house, she takes from a safe that he has there, the combination of which she knows, certain securities and deposited them with the Columbus Trust & Deposit Company, and takes the company's receipt for them. Taylor dies without knowing anything about this and his wife dies shortly thereafter.



## BAR EXAMINATIONS

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These securities are listed among the assets of Mrs. Taylor's estate and Taylor's administrator thereupon learned of the above mentioned facts and promptly notified the Trust Company that he claimed them as belonging to Mr. Taylor's estate. The Trust Company refused to surrender them and files a bill of interpleader setting forth these facts against Taylor's administrator and the administrator of Mrs. Taylor's estate. Both administrators demur to the bill.

What order should be made? Why?

**Answer 503.**

The allegations of the bill of interpleader being admitted by the demurrers of both of the defendants, the court should order the securities turned over to Taylor's Administrator. No title passed to the wife, as there was no delivery of the securities to her.

## **OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

### **CRIMINAL LAW**

**Question 504.**

Name at least five rights secured to an accused person, under the Constitution of Ohio.

**Answer 504.**

1. The party accused shall be allowed to appear and defend in person and with counsel.
2. To demand the nature and cause of the accusation against him, and to have a copy thereof.
3. To meet the witnesses face to face.
4. To have compulsory process to procure the attendance of witnesses in his behalf.
5. To a speedy, public trial by an impartial jury of the county in which the offense is alleged to have been committed. Ohio Const., Art. 1, Sec. 10.

**Question 505.**

(a) What is a plea in bar in the Court of Common Pleas?

(b) To whom is it tried?

**Answer 505.**

(a) The accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or has been convicted or pardoned for the same offense. To this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. Gen. Code, 13630.

(b) The issue thus made shall be tried to a jury, and on such trial the accused must produce the record of such conviction or acquittal, or such pardon, and prove that he is the person charged in such record or mentioned in such pardon. He may adduce such other evidence as is necessary to establish the identity of such offense. Gen. Code, 13630.

**Question 506.**

A, having been indicted by a grand jury, demurred to the indictment and the demurrer was sustained. The prose-

## BAR EXAMINATIONS

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cutting attorney prosecuted error to this decision in the Court of Appeals.

Could the Court of Appeals reverse the Common Pleas decision if error was manifest?

**Answer 506.**

The prosecuting attorney or the attorney general may except to a decision of the court and may present a bill of exceptions thereto, which the court shall sign, and it shall be made a part of the records. Gen. Code, 13681.

The purpose of a bill of exceptions, under this section, is not to obtain a reversal, but to determine the law to govern in a similar case. State vs. Granville, 45 O. S., 264.

This section evidences a legislative intent not to authorize the state to institute proceedings in error to reverse a judgment rendered in favor of the accused in a criminal case. State vs. Simmons, 49 O. S., 305.

**Question 507.**

X, in the presence of his wife Y, attacked Z with a knife, cutting him severely. On the trial of X, the State called Y, the wife of X as a witness, she having quarreled with X and offering to testify. Was her evidence competent?

**Answer 507.**

Her evidence was not competent.

At common law husband and wife were incompetent to testify, either for or against each other.

"Husband and wife shall be competent witnesses to testify in behalf of each other in all criminal prosecutions." Gen. Code, 13659.

**Question 508.**

(a) Upon whom, in a criminal trial, is the burden of proving or disproving self-defense, and what degree of proof is required?

(b) In an application for a writ of habeas corpus, to what extent will the court consider the probable guilt or innocence of the applicant?

**Answer 508.**

(a) Insanity and self defense, being substantive defenses, place the burden of proving them upon the defendant; the degree required being a preponderance.

"The burden of proof upon the issue of insanity does not shift from the defendant to the state, but the defendant

must establish that issue by a preponderance of all the evidence adduced on the trial." *Rehfeld vs. State*, 102, O. S., O. L. R., Aug. 1, 1921.

(b). Not at all.

If it appears that the person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or magistrate, or by virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appear after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment or order. Gen. Code, 12165.

Where a court has jurisdiction over an offense charged, the guilt or innocence of the prisoner will not be inquired into on habeas corpus proceedings. *In re, Poage* 87, O. S., 72.

By the provisions of General Code, 12165, the inquiry in habeas corpus cases, like the one at bar, is limited to the question of jurisdiction. *In re Wyant*, 8 O. N. P., N. S., 207.

Habeas corpus is available only where the court has no jurisdiction to cause the arrest and detention, and is not the form of action in which to try the guilt or innocence of the party. *Bernhardt vs. Wise*, 15 O. C. C., N. S., 158.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1919**

### **CRIMINAL LAW**

#### **Question 509.**

- (a) Define crime.
- (b) Define criminal intent.
- (c) What is the classification of crime in Ohio according to grade of offence?

#### **Answer 509.**

(a) An act committed or omitted in violation of a public law forbidding or commanding it.

A wrong which the government notices as injurious to the public, and punishes in what is called a criminal proceeding in its own name. 1 Bishop Criminal Law, Par. 43.

(b) The design, resolve, determination of the mind or mental resolution which prompts the criminal act. Bouvier's Law Dictionary.

(c) Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors. Gen. Code, 12372.

#### **Question 510.**

(a) What authority in Ohio has the power to define crime and fix the punishment therefor?

(b) What is the distinction between tort and crime in Ohio?

#### **Answer 510.**

(a) Inasmuch as no act is a crime in Ohio, unless previously defined by statute as a crime, with a prescribed penalty, the General Assembly is the only authority with power to define crime and fix the punishment therefor.

(b) A tort is a wrong to one in his person, property or reputation for which the law allows the injured person a remedy against the wrongdoer in recovering money damages for the wrong.

A crime is a wrong to one in his person, property or reputation, or a breach of a statutory rule, of such importance to the public, that the state takes cognizance of it and punishes it by an action in its own name.

**Question 511.**

- (a) When is an accused said to have been in jeopardy?
- (b) In how many ways, and in what order, may an accused object or except to an indictment?

**Answer 511.**

(a) Being put to trial upon a good indictment before a court having jurisdiction, and being either convicted or acquitted; but not if the jury disagrees, or the court is compelled to discharge them for good cause before they reach a verdict. Jeopardy begins when the defendant has been arraigned and has pleaded, and the jury have been sworn and charged with his deliverance. Clark on Crim. Law, Par. 138.

(b) A motion to quash may be made where there is a defect apparent on the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. Gen. Code, 13621.

A plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto. Gen. Code, 13622.

The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged and proof thereof is necessary to make out the offense charged. Gen. Code, 13623.

**Question 512.**

(a) At the April Term, 1917, Common Pleas Court of Franklin county, Ohio, A is indicted for burglary, alleged to have been committed in said county and state, the indictment being regular in every particular; trial had and A is acquitted. At a subsequent term of said court, the state being now in possession of new positive evidence of committing of said burglary by A, A is again indicted for the same offense. A employs you to defend him. How would you proceed, and how would the question raised by you be tried?

(b) A man commits a felony and afterwards becomes insane. Can he be compelled to plead to an indictment?

**Answer 512.**

(a) By filing a plea in bar to the indictment. If issue were raised on this plea, it would be tried to a jury.

The accused may then offer a plea in bar to the indict-

ment that he has before judgment of acquittal, or has been convicted or pardoned for the same offense. To this plea the prosecuting attorney may reply that there is no record of such acquittal or conviction, or that there has been no pardon. The issue thus made shall be tried to a jury, and on such trial the accused must produce the record of such conviction or acquittal, or such pardon, and prove that he is the person charged in such record or mentioned in such pardon. He may adduce such other evidence as is necessary to establish the identity of such offense. Gen. Code, 13630.

A plea in bar or abatement shall not be received by the court unless it is in writing, signed by the accused, and sworn to before a competent officer. Gen. Code, 13631.

(b) He cannot.

If a person under indictment appears to be insane, proceedings shall be had as provided for persons not indicted because of insanity. Gen. Code, 13614.

Question 513.

(a) In what cases are dying declarations admissible as evidence?

(b) May an accused be tried in his absence? If so, when?

Answer 513.

(a) Only in trials for the murder or manslaughter of the declarant, and when the declarant is shown to the satisfaction of the judge to have been in actual danger of death, and to have given up all hope of recovery, at the time the declaration was made. 1 Greenleaf, Par. 156.

The dying declaration of a woman who dies in consequence of the miscarriage or attempt to produce miscarriage under investigation, as to the cause and circumstances of such miscarriage or attempt, shall be admissible. Gen. Code, 12412-1.

(b) A person indicted for misdemeanor, upon request in writing subscribed by him and entered on the journal, may be tried in his absence, or by the court. No other person shall be tried unless personally present, but if a person indicted escape or forfeit his recognizance, after the jury is sworn, the trial shall proceed and the verdict be received and recorded. If the offense charged is a misdemeanor, judgment and sentence shall be pronounced as if he were personally present; and, if a felony, the case shall be continued, until the accused appears in court, or is retaken. Gen. Code, 13676.

## OHIO STATE BAR EXAMINATION

JUNE, 1920

### CRIMINAL LAW

#### Question 514.

What are the principal rights guaranteed to every citizen in a criminal matter under Section 10, Article 1 of the Constitution of the State of Ohio?

#### Answer 514.

In any trial, in any court, the party accused shall be allowed—

1. To appear and defend in person and with counsel;
2. To demand the nature and cause of the accusation against him, and to have a copy thereof;
3. To meet the witnesses face to face;
4. To have compulsory process to procure the attendance of witnesses in his behalf.
5. To a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.
6. No person shall be compelled, in any criminal case, to be a witness against himself.
7. No person shall be twice put in jeopardy for the same offense. Ohio Const., Art. 1, Sec. 10.

#### Question 515.

What difference in proof is required between a civil case and a criminal case?

#### Answer 515.

In the **ORDINARY CIVIL CASE** the degree of proof, or the quality of persuasion as some text writers characterize it, is a **MERE PREPONDERANCE OF THE EVIDENCE**.

In **CRIMINAL CASES** in all civilized countries the degree of proof is enhanced beyond that of civil cases in the degree that the state has a more jealous concern for the lives and liberties of its inhabitants than it can possibly entertain for property rights. The burden of all such prosecutions is to prove every essential element of the crime **BEYOND A REASONABLE DOUBT**.

There is, however, a well recognized intermediate degree of proof required in a certain class of cases—a stricter standard, generally termed “clear and convincing”—cases



## BAR EXAMINATIONS

where the charge of fraud is involved; proving the existence of a lost or spoliated will; an agreement to bequeath by will; mutual mistake sufficient to justify reformation of an instrument; engrafting of trusts; establishment of an equitable mortgage out of deed absolute on its face and kindred questions.

The term "clear and convincing" has come to have a well-defined meaning with the bench and bar. It indicates a degree of proof required in civil cases such as we referred to less than the degree required in criminal cases, but more than required in the ordinary civil action.

Experience of two centuries clearly indicates that in the **ORDINARY CIVIL CASES** the degree of proof be characterized as **A PREPONDERANCE**:

In the **EXCEPTIONAL CIVIL CASE** of the type heretofore indicated it should be **CLEAR AND CONVINCING**; and in the **CRIMINAL CASE**, **BEYOND A REASONABLE DOUBT**. *Merrick vs. Ditzler*, 91 O. S., at 260, et seq.

**Question 516.**

How must an indictment conclude?

**Answer 516.**

All indictments shall conclude "against the peace and dignity of the State of Ohio." Ohio Const., Art. IV, Sec. 20.

**Question 517.**

What is the difference between larceny, embezzlement and burglary?

**Answer 517.**

Whoever steals anything of value is guilty of larceny, and if the value of the thing stolen is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than seven years, or, if the value is less than that sum, be fined not more than Two Hundred Dollars, or imprisoned not more than thirty days or both. Gen. Code, 12447.

Whoever, being an officer, attorney at law, agent, clerk, guardian, executor, administrator, trustee, assignee in insolvency, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant or employee of a person, except apprentices or persons under eighteen years of age, embezzles or converts to his own use, fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use anything of value which shall come

into his possession by virtue of his election, appointment or employment thereto, if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if such total value is less than thirty-five dollars shall be fined not more than two hundred dollars or imprisoned not more than thirty days or both. Gen. Code, 12467.

Whoever, in the night season, maliciously and forcibly breaks and enters, or attempts to break and enter an uninhabited dwelling house or a kitchen, smokehouse, shop, office, storehouse, warehouse, malthouse, stillhouse, mill, pottery, factory, watercraft, schoolhouse, church or meeting house, barn or stable, railroad car, car factory, station house, hall or other building, or attempts to break and enter an inhabited dwelling house with intent to steal property of any value, or with intent to commit a felony, shall be imprisoned in the penitentiary not less than one year nor more than fifteen years. Gen. Code, 12438. (Burglary of inhabited dwelling, Gen. Code, 12437.)

Question 518.

- (a) What is meant in criminal law by "Corpus delicti?"
- (b) When is an official authorized to arrest a person without a warrant?

Answer 518.

(a). "Corpus delicti" is a doctrine of the criminal law, requiring that it be proved beyond a reasonable doubt that the crime charged has actually been committed, before the accused can be convicted. Clark on Criminal Law, p. 158.

(b) A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained. Gen. Code, 13492.

Under a proper construction of General Code 13492, and General Code 4386, which must be construed together, a marshal of a municipal corporation is authorized, without warrant, to arrest a person found on the public streets of the corporation, carrying concealed weapons contrary to law, although he has no previous knowledge of the fact, if he act bona fide and upon such information as induces an honest belief that the person arrested is in the act of violating the law. Ballard vs. State, 43 O. S., 340.

# OHIO STATE BAR EXAMINATION

DECEMBER, 1920

## CRIMINAL LAW

Question 519.

(a) Into what classes are criminal offenses divided? Distinguish between them.

(b) What is the provision of law, if any, as to limitation of time for commencement of a criminal prosecution?

Answer 519.

(a) Crimes in Ohio are divided into two classes, felonies and misdemeanors.

General Code, 4372. Offenses which may be punished by death, or imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors.

(b) There is no limitation upon the time for the commencement of a prosecution for a felony.

General Code, 4381. A person shall not be indicted or criminally prosecuted for a misdemeanor, the prosecution of which is not specially limited by law, unless such indictment is found, or prosecution is commenced, within three years from the time said misdemeanor was committed.

Question 520.

A states to B that he intends to kill C. B urges him to do so and, a few days afterwards, A commits the murder. State whether or not B is guilty of any crime. Answer fully; giving reason for answer.

Answer 520.

General Code, 12380. Whoever aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.

"Aid" means to help or assist or strengthen; "abet" means to encourage, counsel, incite or assist in a criminal act; "procure" means to persuade, induce, prevail on, to cause or bring about. State vs. Snell, 2 Ohio, N. P., p. 55.

One who "requests" the commission of a felony is an aider and abettor if such request is effective. Berry vs. State, 81 O. S., 219.

Question 521.

Write not to exceed 100 words as to the right or necessity of trial by jury in criminal cases.

Answer 521.

The right of trial by jury is the outgrowth of injustices

perpetrated upon the people in the middle ages through the tyranny of those who were superior to them in rank or station. The right of trial by jury has been for ages one of the great bulwarks of the liberties of the people. The right is especially provided for in the famous bill of rights which is set forth in the English statute of the first William and Mary, Chap. 2 the said statute being passed in 1689. The fundamental principal of trial by jury is that it is unjust to allow a man to be deprived of his liberty or his property, except by the judgment of his peers. A common law "jury" as used in the constitution means twelve competent men, disinterested and impartial, not of kin of either of the parties having their homes within the jurisdictional limit of the court, drawn and elected by officers free from all bias, in favor of or against either party; duly impaneled, and sworn to render a true verdict, according to the law and evidence.

In the Ohio Constitution, Article I, Sec. 5, it is provided that the right of trial of jury shall be inviolate. In article 1, Sec. 10, it is also provided that in any trial in any court, the party accused shall be entitled to a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

It is held in *Inwood vs. The State of Ohio*, 42 O. S., 186, that a statute which authorizes a penalty by fine only, upon a summary conviction of a violation of a police regulation providing for a punishment by fine only, is not in conflict with these sections of the Ohio Constitution, on the ground that no provision is made for a trial by jury in such cases.

Question 522.

- (a) What is a search warrant?
- (b) By whom may it be issued?

(c) What procedure must be followed to secure the issuance of such warrant?

Answer 522.

(a) A search warrant is a written authority issued by the proper public officer to search a house or place for personal property stolen, used for gambling, etc.

(b) A search warrant may be issued by a justice of the peace, mayor, or police judge. Gen. Code, 13482.

(c) The Constitution of Ohio, Art. 2, Sec. 14, provides the right of the people to be secure in their person, houses, papers and possessions against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation,

## BAR EXAMINATIONS

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particularly describing the place to be searched and the persons and things to be seized.

**General Code, 13483.** A warrant for search will not be issued until there is filed with the magistrate an affidavit particularly describing the house or places to be searched, the persons to be seized, and the things to be searched for, and alleging substantially the offense in relation thereto, and that the affiant believes, and has good cause to believe, that such things are there concealed.

Question 523.

- (a) What is a grand jury?
- (b) Of how many members does it consist?
- (c) How many members must concur before an indictment can be returned?
- (d) What official or officials may appear before a grand jury?
- (e) May a grand jury conduct investigations and bring indictments upon its own initiative?

Answer 523.

(a) A grand jury is an inquisitorial body appointed to inquire of and to present all offenses committed within the county in and for which it was impaneled and sworn. Gen. Code, 13559.

It is also the duty of the grand jurors to visit the county jail, once during each term of court, examine its state and condition, and inquire into the discipline and treatment of the prisoners, their habits, diet and accommodations. They shall report to the court, in writing, whether the rules prescribed by said court have been faithfully kept and observed, and whether the law for the regulation of county jails has been violated, stating particulars of such violations. Gen. Code, 13574.

(b) A grand jury in Ohio consists of fifteen members, that being the number prescribed by former statutes in this state. The present statutes do not specifically fix the number of grand jurors. *State vs. Laning*, 7 O. N. P., N. S., 281.

(c) General Code 13571. At least twelve of the grand jurors must concur in the finding of an indictment.

(d) General Code, 13560. The prosecuting attorney or assistant prosecuting attorney shall be allowed at all times to appear before the grand jury for the purpose of giving

## OHIO SUPREME COURT

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information relative to a matter recognizable by it or advise upon a legal matter when required.

(e) Yes. The Constitution of Ohio provides (Art. 1, Sec. 10) that no person can be charged with a felony except upon presentment or indictment or a grand jury. The term presentment means a charge made by the grand jury upon their own initiative.

A special grand jury called to investigate a particular offense, may investigate any violation of the criminal laws of this state. In re: Commissioners 7, Ohio, p. 450.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1921**

**CRIMINAL LAW**

**Question 524.**

- (a) What is meant by "corpus delicti?"
- (b) What is meant by "mittimus"?

**Answer 524.**

(a) "Corpus delicti" is a doctrine of the criminal law, requiring that it be proved beyond a reasonable doubt that the crime charged has actually been committed, before the accused can be convicted. Clark on Criminal Law, p. 158.

(b) A commitment or mittimus is the order of a court or magistrate requiring the accused to be imprisoned until he can be tried, or, in bailable offenses, until he gives bail for his appearance. Clark on Criminal Law, Par. 44.

Forms of commitments are given in Gen. Code, 13553.

**Question 525.**

- (a) Define robbery.
- (b) Define burglary.

**Answer 525.**

(a) Whoever, by force or violence, or by putting in fear, steals and takes from the person of another anything of value is guilty of robbery, and shall be imprisoned in the penitentiary not less than one year nor more than fifteen years. Gen. Code, 12432.

(b) Whoever in the night season maliciously and forcibly breaks and enters, or attempts to break and enter an uninhabited dwelling house, or a kitchen, smokehouse, shop, office, storehouse, warehouse, malthouse, stillhouse, mill, pottery, factory, watercraft, school house, church or meeting house, barn or stable, railroad car, car factory, station house, hall or other building, or attempts to break and enter an inhabited dwelling house with intent to steal property of any value, or with intent to commit a felony, shall be imprisoned in the penitentiary not less than one year nor more than fifteen years. Gen. Code, 12438. (Burglary of an inhabited dwelling, Gen. Code, 12437.)

## OHIO SUPREME COURT

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### Question 526.

A peddler was arrested in Columbus for violation of an ordinance which had been improperly passed.

How would you raise the issue that the ordinance had not been properly passed and how would you prove it?

### Answer 526.

By filing a plea in abatement of the affidavit.

"A plea in abatement may be made when there is a defect in the record shown by facts extrinsic thereto." Gen. Code, 13622.

I would prove it by the testimony of the clerk of the City Council, and would issue a subpoena duces tecum for him, directing him to appear and bring with him all of the records of the Council relating to the passage of the ordinance in question.

### Question 527.

(a) What is the difference between a felony and a misdemeanor?

(b) What is meant by "once in jeopardy" and how is the issue raised?

### Answer 527.

(a) Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors. Gen. Code, 12372.

(b) Being put to trial upon a good indictment before a court having jurisdiction, and being either convicted or acquitted; but not if the jury disagrees, or the court is compelled to discharge them for good cause before they reach a verdict. Jeopardy begins when the defendant has been arraigned and has pleaded and the jury have been sworn and charged with his deliverance. Clark on Criminal Law, Par. 138.

(Upon arraignment) the accused may then offer a plea in bar to the indictment that he has before had judgment of acquittal, or that he has been convicted or pardoned for the same offense. Gen. Code, 13630.

A plea in bar or abatement shall not be received by the court unless it is in writing, signed by the accused, and sworn to before a competent officer. Gen. Code, 13631.

### Question 528.

(a) What are dying declarations and in what cases and under what circumstances are they admissible in Ohio?



## BAR EXAMINATIONS

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(b) Within what time after the commission of a felony must the defendant be indicted and tried in this state?

**Answer 528.**

(a). A statement made by the victim in cases of homicide, while at the point of death and with no hope of recovery, concerning the circumstances and cause of the injury resulting in his death. They are admissible only in trials for the murder or manslaughter of the declarant, and when the declarant is shown to the satisfaction of the judge to have been in actual danger of death, and to have given up all hope of recovery at the time the declaration was made. They are admitted on the grounds of public policy, and from the necessity of the case, as it is not to be allowed that the prisoner should silence the only witness against him. It is also claimed that the sense of impending death is equivalent to the sanction of an oath. 1 Greenleaf on Evidence, Par. 156.

Dying declarations are made admissible by statute, in abortion cases. See Gen. Code, 12412-1.

(b) While General Code 12381 limits prosecutions for misdemeanors to within three years from the time the misdemeanor was committed, there is no section which provides a limited time within which a felony must be prosecuted.

# **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

## **CRIMINAL LAW**

**Question 529.**

(a) What is the difference, in this state, between a felony and a misdemeanor?

(b) What is meant by malice in a legal sense?

**Answer 529.**

(a) Offenses which may be punished by death, or by imprisonment in the penitentiary, are felonies; all other offenses are misdemeanors. Ohio Gen. Code, 12372.

(b) Malice is the dictate of a wicked, depraved and malignant heart, a corrupt motive, and does not necessarily imply ill will toward the party injured. State vs. Turner, W. 20.

**Question 530.**

(a) In what ways may one accused of a crime except to an indictment?

(b) State the purpose of each exception.

**Answer 530.**

(a) The accused may except to an indictment by—first, a motion to quash; second, a plea in abatement; and third, a demurrer. Ohio Gen. Code, 13620.

(b) A motion to quash may be made where there is a defect apparent upon the face of the record, including defects in the form of the indictment or in the manner in which an offense is charged. Ohio Gen. Code, 13621.

A plea in abatement may be made when there is a defect in the record shown by the facts extrinsic thereto. Ohio Gen. Code, 13622.

The accused may demur when the facts stated in the indictment do not constitute an offense punishable by the laws of this state, or when the intent is not alleged and proof thereof is necessary to make out the offense charged. Ohio Gen. Code, 13623.

**Question 531.**

A is indicted for murder in the first degree. He pleads insanity and offers evidence tending to prove insanity. How

## BAR EXAMINATIONS

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and by whom will it be determined whether this defense is valid or not?

**Answer 531.**

The burden of proof as to insanity of the defendant at the time of the killing rests upon the defendant, and he must prove this by a preponderance of the evidence. The jury is to determine whether or not such defense has been established by the evidence.

"The burden of proof upon the issue of insanity does not shift from the defendant to the State, but the defendant must establish that issue by a preponderance of all the evidence adduced from the trial." *Rehfeld vs. State*, 102 O. S., O. L. R., Aug. 1, 1921.

**Question 532.**

B found a ten dollar gold piece but did not know to whom it belonged. He decided to keep it. On the following day, through an advertisement, he learned who lost the coin. On the second day thereafter he spent the money for a pair of shoes.

Was he guilty of larceny? Why?

**Answer 532.**

B is guilty of larceny.

"When a person finds goods that have actually been lost, and takes possession with intent to appropriate them to his own use, really believing at the time, or having good ground to believe, that the owner can be found, it is larceny." *Baker vs. State of Ohio*, 29 O. S., 184.

"The intent to appropriate must concur with the finding." *Brooks vs. State*, 35 O. S., 49.

**Question 533.**

S, D and four others met and agreed to go to a hospital and assault certain workmen who were engaged there as painters, and by the use of violence compel them to desist from pursuing their work.

Pursuant to that purpose the six men entered the hospital, S being armed with a revolver, D with a blackjack, and one of the others with an iron bar.

Having attacked the workmen, S shot one of them, causing his death, and D assaulted another with the blackjack.

These assaults occurred in different rooms. D was not present, nor did he know that S was in possession of

## OHIO SUPREME COURT

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a revolver, or that he used it in causing the workman's death.

S pleaded guilty to a charge of murder.

Of what offense was D guilty, and why.

Answer 533.

D was guilty of murder in the first degree.

"If D conspired with S in a deliberate and premeditated purpose to kill, he would be guilty of murder in the first degree, although he did not in fact fire the shot. And if D engaged in a conspiracy or common design having for its purpose the use of deadly weapons or force or violence upon the workman at Christ Hospital, and the crime committed was the natural and probable consequence of the execution of such common design, or was undertaken under such circumstances as would probably endanger human life, then D, under our statute, would be equally guilty with S, who actually fired the shot, although D neither knew of nor connived at the shot.

This feature of the criminal law is founded upon the basic principle that persons engaged in an unlawful enterprise are presumed to acquiesce in whatever may be reasonably necessary to accomplish the object of the conspiracy; and if, under the circumstances, it might be reasonably expected that life might be endangered by the manner or means of performing the unlawful or criminal act conspired, each is bound by the consequences naturally or probably arising in its furtherance, and in case of death would be guilty of homicide. State vs. Doty, 94, O. S., 258.

**OHIO STATE BAR EXAMINATION**

**JUNE, 1919**

**CONSTITUTIONAL LAW**

**Question 534.**

(a) How was the Constitution of the United States proposed and adopted?

(b) How can it be amended?

**Answer 534.**

(a) The constitutional convention was called for the second Monday in May, 1787, by a resolution passed February 21, 1787, by the congress of the confederation; the constitution was drawn up, and the convention adjourned September 17, 1787, submitting the constitution to the people of the several states for ratification.

The constitution was adopted by the convention, September 17, 1787, ratified by nine states, the necessary number, June 21, 1788, and went into force, March 4, 1789, eleven states having then adopted it.

(b) Two thirds of both houses of Congress may propose amendments, which if ratified—

(1) By the legislatures of three-fourths of the states, or

(2) By conventions in three-fourths thereof, shall be valid, to all intents and purposes, as if a part of the constitution.

Congress shall, on the application of the legislatures of two-thirds of the states, call a convention for proposing amendments, which proposals shall be valid amendments, if ratified—

(3) By the legislatures of three-fourths of the states, or

(4) By conventions in three-fourths thereof. U. S. Const., Art. V.

**Question 535.**

(a) How many constitutions has the State of Ohio had?

(b) When was each adopted?

**Answer 535.**

(a) Two.

(b) 1802 and 1851.

## OHIO SUPREME COURT

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### Question 536.

(a) How may amendments to the Ohio Constitution be proposed?

(b) How may a proposed amendment be adopted as a part of the Ohio Constitution?

### Answer 536.

(a) **INITIATIVE PETITION**—Proposed amendment is submitted to the electors upon filing a petition signed by ten per cent of the electorate.

**GENERAL ASSEMBLY**—Two-thirds of the members elected to each house, may vote to call a convention to revise, change or amend the constitution.

**GENERAL ASSEMBLY**—Three-fifths of the members elected to each house concurring, an amendment proposed by them shall be submitted to the electors.

**QUESTION ON BALLOT**—In 1932, and each twentieth year thereafter the question shall be submitted to the electors—"Shall there be a convention to revise, alter or amend the constitution?"

(b) An amendment in any of these ways requires the submission of the proposed amendment to the electorate, and a vote of a majority of the electors at the polls.

"No amendment of this constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect, until the same shall have been submitted to the electors of the state, and adopted by a majority of those voting thereon." Ohio Const., Art. XVI, Sec. 3.

### Question 537.

(a) What is the difference between a constitutional provision and a legislative act?

(b) Must an act, in order to be valid, be authorized, expressly or by inference, by the constitution?

### Answer 537.

(a) A constitutional provision is a fundamental and permanent rule of law set forth in a constitution, and which cannot be changed or repealed, except by the means provided in the constitution itself.

A legislative act is a rule of law promulgated by a legislative body, which act can be changed or repealed by the body which enacted it, or by any subsequent legislature.

(b) In reference to the United States government, an act, to be valid, must be authorized, expressly or by implication, by the United States Constitution.

## BAR EXAMINATIONS

In reference to the state governments, an act is valid without any authorization, unless the power to enact such a provision has been granted exclusively to the Federal government under the United States Constitution or unless said act is prohibited by the United States Constitution, or that of the state.

Question 538.

What constitutional questions passed upon by the Supreme Court of this state may be reviewed by the Supreme Court of the United States?

Answer 538.

The Supreme Court of the United States is vested with the power to issue a writ of error to review the final judgment or decree of the highest court of a state, in which a decision could be had in the following cases:

1. Where the validity of a treaty or statute of, or an authority exercised under the United States, is drawn in question and the decision of the state court is against their validity;

2. Where the validity of a statute of, or an authority exercised under a state, is drawn in question on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision of the state court is in favor of their validity;

3. Where any title, right, privilege or immunity so claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision of the state courts is against the title, right, privilege or immunity so set up or claimed, under such constitution, treaty, statute, commission or authority. United States Revised Statutes, 709.

Question 539.

May any law be valid which interferes with or abrogates a right guaranteed by either the Constitution of Ohio or the Constitution of the United States? (Answer fully.)

Answer 539.

The question whether an act repugnant to the constitution can become the law of the land, is a question deeply interesting to the United States; but happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis upon which the whole American fabric has been erected. The exercise of this original right is of very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

Certainly all those who have framed written constitutions contemplate them as forming the paramount and fundamental law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. Chief Justice Marshall in *Marbury vs. Madison*, 1 Cranch., 137.



## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### CONSTITUTIONAL LAW.

Question 540.

- Give (a) The preamble to the Federal Constitution  
(b) Five powers of Congress.

Answer 540.

- (a) We, the people of the United States, in order to  
(1) Form a more perfect union;  
(2) Establish justice;  
(3) Insure domestic tranquility;  
(4) Provide for the common defense;  
(5) Promote the general welfare, and  
(6) Secure the blessings of LIBERTY to ourselves and our posterity, do ordain and establish this

#### CONSTITUTION FOR THE UNITED STATES OF AMERICA.

- (b) The Congress shall have power:  
(1) To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.  
(2) To borrow money on the credit of the United States.  
(3) To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.  
(4) To establish a uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States.  
(5) To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.  
U. S. Const., Art. 1, Sec. 8.

Question 541,

State briefly the fundamental difference between the Federal and Ohio Constitutions with reference to delegated powers and reservations.

Answer 541.

The Federal Constitution is a grant of power, while the state constitutions are limitations upon the reserved powers of the people.

There is an essential distinction between the United States constitution and the various state constitutions. The United States government is a government which took its power from a grant of power by thirteen original states. These states before adoption of the constitution had all the power that a people may have. Voluntarily they established the United States government, setting out the powers of that government in a constitution. The powers of that government are therefore to be sought in that constitution. If they are not either expressly or impliedly in the constitution they do not exist. We therefore speak of the United States government as a government of granted powers. The states, on the other hand, retained all the powers which they did not in the United States constitution grant away. In other words, they have all of the powers which a political organization may have except that power which they gave away. Accordingly, if we seek to find whether the United States has a certain power, we must look for that power as expressly or impliedly contained in the United States constitution. But if we look for the power of a state we simply have to look in the first place whether that particular power has been granted away in the United States constitution, or has been limited by the state constitution, and whatever a state has placed in its own constitution, it may change at pleasure so long as it does not contravene the provisions of the United States constitution.

Question 542.

(a) Into what branches are governmental powers divided by the Federal Constitution?

(b) What is the provision of the Federal Constitution with reference to the making of treaties with foreign nations?

Answer 542.

(a) Legislative—Article I.

Executive—Article II.

Judicial—Article III.

(b) He (the president) shall have power by and with the advice and consent of the senate, to make treaties, provided two-thirds of the Senators present concur. Art. II, Sec. 2 (2).

Question 543.

With reference to Ohio Constitution:

(a) What sort of tax is forbidden?

(b) Taxation must be by what kind of rule?

## BAR EXAMINATIONS

(c) May a citizen sue the state?

(d) What if any provision is there, as to recoveries for wrongful death?

(e) To what amount, if any, is the state debt limited?

**Answer 543.**

(a) No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value. Art. XII, Sec. 1.

(b) Laws shall be passed, taxing by a UNIFORM rule, etc. Art. XII, Sec. 2.

(c) Suits may be brought against the state, in such courts and in such manner, as may be provided by law. Art. 1, Sec. 16.

(d) The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law. Art. 1, Sec. 19a.

(e) The aggregate amount of such debts (of the state), direct or contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time shall never exceed seven hundred and fifty thousand dollars. Art. VIII, Sec. 1.

**Question 544.**

What county officers are eligible to office no more than four years in any six year period?

**Answer 544.**

No person shall be eligible to the office of sheriff, or county treasurer, for more than four years, in any period of six years. Art. X, Sec. 3.

**Question 545.**

Article IV, Section 6, of the Ohio Constitution provides among other things:

"The courts of appeal shall have.....appellate jurisdiction.....to review, affirm, modify or reverse the judgment of the Courts of Common Pleas, Superior Courts and other courts of record within the district as may be provided by law."

Is a statute constitutional which prescribes certain cases in the Court of Common Pleas which may and others which may not be reviewed on error by the Court of Appeals?

OHIO SUPREME COURT

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**Answer 545.**

**The statute is unconstitutional.**

**The General Assembly has no power to enlarge or limit the jurisdiction conferred by the constitution of the state, but may provide by law for the method of exercising that jurisdiction. Cincinnati Polyclinic vs. Balch, 92 O. S., 415.**

## **OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

### **CONSTITUTIONAL LAW**

**Question 546.**

**Give the preamble of the Federal Constitution.**

**Answer 546.**

**We, the people of the United States, in order to**

- (1) Form a more perfect union;**
- (2) Establish justice;**
- (3) Insure domestic tranquility;**
- (4) Provide for the common defense;**
- (5) Promote the general welfare, and**
- (6) Secure the blessings of LIBERTY to ourselves and our posterity do ordain and establish this**

### **CONSTITUTION FOR THE UNITED STATES OF AMERICA**

**Question 547.**

**Define:**

- (a) Ex post facto law.**
- (b) Writ of Habeas corpus.**
- (c) What constitutional limitation is there in the Federal Constitution concerning the issuance of such writ?**

**Answer 547.**

**(a) 1 Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.**

**2. Every law that aggravates a crime, and makes it greater than it was, when committed.**

**3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed.**

**4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender. Calder vs. Bull, 3 Dall. 386.**

**(b) A person unlawfully restrained of his liberty, or a person entitled to the custody of another, of which custody he is unlawfully deprived, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment, restraint or deprivation. Gen. Code, 12161.**

OHIO SUPREME COURT

(c) The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. U. S. Const., Art. I, Sec. 9, (2.)

Question 548.

Name the safeguards thrown around a person charged with crime in the Federal Constitution.

Answer 548.

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty or property, without due process of law. Amendments, Art. V.

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. Amendments, Art. VI.

Question 549.

Define:

(a) Initiative, Referendum.

(b) What exceptions does the Constitution of Ohio provide concerning a referendum as to laws passed by the legislature, if any.

Answer 549.

(a) INITIATIVE is a right of a specified number of the electorate to unite in proposing laws to the legislative body, which, after due consideration, must submit the same to the vote of the people for their approval or disapproval.

REFERENDUM is the referring of legislative acts to the electorate for their final acceptance or rejection. Bouvier's Law Dictionary.

(b) Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions and emergency laws necessary for the immediate

## BAR EXAMINATIONS

preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a ye and nay vote must receive the votes of two thirds of all the members elected to each branch of the General Assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a ye and nay vote upon a separate roll call thereon. The laws mentioned in this section shall not be subject to the referendum. Ohio Const. Art. II, Sec. 1d.

Question 550.

(a) What provision is made in the Ohio Constitution relative to "retroactive laws" and laws providing for the impairment of contracts?

(b) In whom is the judicial power of the state of Ohio vested.

Answer 550.

(a) The General Assembly shall have no power to pass "retroactive laws" or laws impairing the obligations of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as may be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors in instruments, and proceedings, arising out of their want of conformity with the laws of this state. Ohio Const., Art. II, Sec. 28.

(b) The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate and such other courts inferior to the Courts of Appeals as may from time to time be established by law. Ohio Const., Art. IV, Sec. 1.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1920

### CONSTITUTIONAL LAW

Question 551.

In what controversies may the jurisdiction of the United States Courts be invoked?

Answer 551.

In all cases in LAW and EQUITY, arising

1. Under this constitution.
2. The laws of the United States, and
3. Treaties made, or which shall be made under their authority.
4. All cases affecting ambassadors, other public ministers and consuls.
5. All cases of ADMIRALTY and MARITIME jurisdiction.
6. To controversies to which the United States shall be a party.
7. To controversies between two or more states.
8. Between a state and citizens of another state.
9. Between citizens of different states.
10. Between citizens of the same state, claiming land under grants of different states.
11. Between a state or citizens thereof, and foreign states, citizens or subjects. U. S. Const., Art. III, Sec. 2.

AMENDMENT No. 11—THE JUDICIAL POWER SHALL NOT EXTEND—

To any suit in law or equity, commenced or prosecuted against one of the United States

—By citizens of another state or

—By citizens or subjects of any foreign state.

Question 552.

How may the constitution of the United States and that of the State of Ohio be amended?

Answer 552.

AMENDMENTS TO THE UNITED STATES CONSTITUTION—

Two-thirds of both houses of Congress may propose amendments, which if ratified—

1. By the legislatures of three-fourths of the states, or



## BAR EXAMINATIONS

2. By conventions in three-fourths thereof, shall be valid, to all intents and purposes, as if a part of the constitution.

Congress shall, on the application of the legislatures of two-thirds of the states, call a convention for proposing amendments, which proposals shall be valid amendments, if ratified.

3. By the legislatures of three-fourths of the states, or

4. By conventions in three-fourths thereof.

### AMENDMENTS TO THE OHIO CONSTITUTION—

1. Proposed amendment is submitted to the electors upon filing a petition signed by ten per cent of the electors.

2. Two-thirds of the members elected to each house, may vote to call a convention to revise, amend or change the constitution.

3. Three-fifths of the members elected to each house concurring, an amendment proposed by them shall be submitted to the electors.

4. In 1932, and each twentieth year thereafter, the question shall be submitted to electors—"Shall there be a convention to revise, alter or amend the constitution?"

Question 553.

Contrast the powers of the Federal government under its Constitution, and those of one of the states, say Ohio, under its constitution.

Answer 553.

There is an essential distinction between the United States Constitution and the various state constitutions. The United States government is a government which took its power from a grant of power by thirteen original states. Those states before the adoption of the constitution had all the power that a people may have. Voluntarily they established the United States government, setting out the powers of that government in a constitution. The powers of that government are therefore to be sought in the constitution. If they are not either expressly or impliedly in the constitution they do not exist. We therefore speak of the United States government as a government of granted powers. The states, on the other hand, retained all the powers which they did not in the United States Constitution grant away. In other words, they have all of the powers which a political organization may have except that power which they gave away. State constitutions are passed by

## OHIO SUPREME COURT

the people of the states themselves as limitations upon their own power.

### Question 554.

In cases where jurisdiction is common to both state and United States court, does the rule of first invocation prevent you from removing a defendant cause from a state to a United States court?

If not, in what kind of cases can you secure removal, and how and in what court do you proceed to secure removal?

### Answer 554.

It is not permissible for the states to deny the right of removal in cases where it is granted by congress, nor to put any restrictions or limitations upon it. Black on Constitution Law, p. 194.

The following cases can be removed from the State Court to the Federal Court.

1. Cases involving federal questions.
2. Suits by the United States or its officers.
3. Suits or separable controversies between citizens of different states.
4. Suits between citizens and aliens under grant of lands by different states.
6. Suits for denial of civil rights.
7. Suits and prosecutions against revenue officers, etc.
8. Suits by aliens against civil officers of the United States.

Suits brought under the federal employers liability act, by the terms of the act itself, cannot be removed from the state to the federal court.

A petition should be filed in the state court, within the time prescribed by the statute, alleging all necessary facts as existing at the commencing of the case, and at the date of filing the petition for removal, and accompanied by a proper bond. In order to get the removal the state court should accept the bond, but a refusal of the state court to enter such order does not defeat the right of said removal. A transcript of the record must then be filed with the federal court.

In those cases where the ground of removal is prejudice or local influence, or when the suit or prosecution is against revenue officers, etc., the petition for removal must be filed in the United States District Court.

## BAR EXAMINATIONS

### Question 555.

(a) What courts may pass on the constitutionality of acts of the legislature?

(b) What if any acts of a legislature may be passed on by the federal court touching their constitutionality?

### Answer 555.

(a) There is no rule imposed upon the court by any constitutional provision or statute preventing them from passing on the constitutionality of the actions of the legislature. *Black on Constitutional Law*, p. 63.

Some rules in reference to this matter have been established which should be observed.

1. Inferior courts whether of state or federal system, should not undertake to judge against the validity of a statute, except in cases where its unconstitutionality is plain and unmistakable.

2. If the court of last resort in a state has pronounced in favor of or against the unconstitutionality of a state statute, its decision is binding in all the inferior courts of the state.

3. If the question of the validity of a statute of one state comes legitimately before the court of another state, such courts are at liberty to determine the question for themselves.

4. The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon all courts of the United States, and will not be reviewed by them.

5. The validity of an act of congress may be passed upon by the state court until it has been settled by the Supreme Court of the United States.

6. A decision of the Supreme Federal Court, for or against the validity of an act of congress, or for or against the validity of a state law in respect to its conformity to the Federal Constitution or Federal Law, is binding and conclusive, upon all courts of every grade, both state and national.

(b) A statute of a state, when it is drawn into controversy on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision of the state court is in favor of its validity, may be considered by the Supreme Court of the United States in an appeal from the court of last resort of the state. *United States Revised Statutes*, Sec. 709, Par. 2.

## OHIO STATE BAR EXAMINATION

JUNE, 1921

### CONSTITUTIONAL LAW

Question 556.

Give in full the Preamble to the Constitution of the United States.

Answer 556.

We, the people of the United States, in order to

- (1) Form a more perfect union;
- (2) Establish justice;
- (3) Insure domestic tranquility;
- (4) Provide for the common defense;
- (5) Promote the general welfare, and
- (6) Secure the blessings of LIBERTY to ourselves and our posterity, do ordain and establish this

**CONSTITUTION FOR THE UNITED STATES OF  
AMERICA**

Question 557.

If the following proposed measures were enacted by the General Assembly of Ohio, what, if any, constitutional invalidity could you point out?

(a) Providing that one found guilty of robbery should be put to death by the method of being drawn and quartered?

(b) Providing that one who was convicted of the crime of murder in the second degree might be pardoned (by mere act of the General Assembly)?

(c) Providing that the rate of interest collectible on a promissory note should be ten (10) per cent, when not otherwise stipulated in the contract?

Answer 557.

(a) Cruel and unusual punishments shall not be inflicted. Ohio Const., Art. I, Sec. 9.

(b) The General Assembly shall exercise no judicial power not herein expressly conferred. Ohio Const., Art. II, Sec. 32.

The governor shall have power, after conviction, to grant reprieves, commutations and pardons, for all crimes and offenses except treason and cases of impeachment, upon such conditions as he may think proper. Ohio Const., Art. II, Sec. 11.

## BAR EXAMINATIONS

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(c) No state shall deprive any person of life, liberty or property without due process of law. U. S. Const. Amend. 14, Par. 1.

Everything which the law recognizes as property is within the protection of the constitution. Thus, the liberty of making contracts is property, or at least a property right. Black on Const. Law, p. 574.

Question 558.

If the following proposed measures were enacted by the General Assembly of Ohio, what, if any, constitutional invalidity could you point out?

(a) Providing that the State of Ohio might issue its bonds in the sum of twenty million dollars, the proceeds to be applied to payment of state's share of building a system of state highways?

(b) Providing that the nomination of candidates for governor of Ohio should be had by the old convention system instead of direct primary?

(c) Providing that the term of office of associate justices of the Supreme Court hereafter elected should be seventeen years?

Answer 558.

(a) Except as otherwise provided in this constitution, the state shall never contract any debt for the purposes of internal improvement. Ohio Const., Art. XII, Sec. 6.

The state may contract debts to supply casual deficits or failures in revenue, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent—shall never exceed \$750,000. Ohio Const., Art. VIII, Sec. 1.

Except the debts above specified in section one and two of this article, no debts whatever shall be created by or on behalf of the state. Ohio Const., Art. VIII, Sec. 3.

(b) All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by a petition as provided by law. Ohio Const., Art. V, Sec. 7.

(c) This law would be constitutional.

The judges of the Supreme Court shall be elected by the electors of the state at large for such term, not less than six years, AS MAY BE PRESCRIBED BY LAW. Ohio Const., Art. IV, Sec. 2.

## OHIO SUPREME COURT

### Question 559.

If the following proposed measures were enacted by the General Assembly of Ohio, what, if any, constitutional invalidity could you point out?

(a) Providing that if one indicted for the crime of murder in the first degree (ordinarily an unballable offense) should, pending trial, become so ill that he could not be brought into court, nevertheless the hearing should proceed in the absence of the prisoner.

(b) Providing that in the trial of one indicted for burglary a valid verdict might be returned by concurrence of three-fourths of the petit jury?

### Answer 559.

(a) In any trial, in any court, the party accused shall be allowed to appear in person and with counsel; and to meet the witnesses face to face. Ohio Const., Art. I, Sec. 10.

(b) The right of trial by jury shall be inviolate. Ohio Const., Art. I, Sec. 5.

### Question 560.

If the following proposed measures were enacted by the General Assembly of Ohio, what, if any, constitutional invalidity could you point out?

(a) Providing that upon filing with the recorder of mortgage securing payment for money loaned the lender should pay into the county treasury as a registration fee, one-half of one per cent of the face of the mortgage debt, and that then the debt would be exempt from taxation?

(b) Providing that the salaries of the associate justices of the Supreme Court of Ohio, elected in 1920, should be \$6,000 instead of \$8,500 as the law provided when they were inducted into office?

### Answer 560.

(a) Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property according to its true value in money. Ohio Const., Art. XII, Sec. 2.

(b) The judges of the Supreme Court, and of the Court of Common Pleas, shall at stated times, receive for their services, such compensation as may be provided by law; which shall not be diminished, or increased, during their term of office. Ohio Const., Art. IV, Sec. 14.

## BAR EXAMINATIONS

Question 561.

(a) What constitutional limitations exist, if any, as to the power of the Common Pleas Courts of Ohio to declare an act of the General Assembly to be unconstitutional?

(b) Court of Appeals?

(c) Supreme Court of Ohio?

(d) Is power expressly granted by the Constitution of the United States to declare an act of Congress to be in contravention of the Federal Constitution.

Answer 561.

(a) None.

(b) None.

(c) In Section 2, Article IV of the Ohio Constitution, the very section which gives the Supreme Court of Ohio its existence, it is provided that "No law shall be held unconstitutional and void by the Supreme Court, without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void." Much significance is to be attached to the inclusion of this provision in the judicial article. It represents, as is known of all men, a compromise between those of our people who sought to deny to the court the right to exercise the power at all and those who felt that the Supreme Court should be unhampered by any such restriction. Of all the states in the Union, the constitution of ours alone has thus expressly granted this great power to its highest court, and we are reminded that it should be exercised with the greatest possible care and reserve. The power was exercised almost from its beginning by the Supreme Court of Ohio, but always, until 1913, by and through a claim of an implied grant of power. *State ex rel, vs. Fidelity Co.*, 96 O. S., at 258.

(d) It is not.

The first case in which the Supreme Court of the United States adjudged an act of Congress to be unconstitutional and void was *Marbury vs. Madison* (1 Cranch 137.) But it is now fully and irrevocably settled, not only that the power belongs to the judicial tribunals, but that they are bound to exercise it in all proper cases. *Black on Constitutional Law*, p. 58.

## **OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

### **CONSTITUTIONAL LAW**

**Question 562.**

**Give in full the Preamble to the Federal Constitution.**

**Answer 562.**

**We, the people of the United States, in order to**

- (1) Form a more perfect union;**
- (2) Establish justice;**
- (3) Insure domestic tranquility;**
- (4) Provide for the common defense;**
- (5) Promote the general welfare, and**
- (6) Secure the blessings of LIBERTY to ourselves and**

**our posterity; do ordain and establish this**

**CONSTITUTION FOR THE UNITED STATES OF  
AMERICA**

**Question 563.**

**(a) Distinguish between a retroactive law and an ex post facto law, as these are technically known.**

**(b) Give an example of each.**

**(c) Has the Federal Government the right of eminent domain within the State of Ohio?**

**(d) Has the President the power to use the United States Army to prevent the obstruction of the mails by railroad strikers in the state of Ohio?**

**Answer 563.**

**(a) "I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." Calder vs. Bull, 3 Dallas, 386.**

**"All these and similar laws are manifestly unjust and oppressive. In my opinion, the true distinction is between**



## BAR EXAMINATIONS

ex post facto laws and retrospective laws. Every ex post facto law must necessarily be retrospective, but every retrospective law is not an ex post facto law; the former only are prohibited. Every law that takes away or impairs rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule that a law should have no retrospect; but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion, or of pardon. They are certainly retrospective, and literally both concerning, and after, the facts committed." *Calder vs. Bull*, 3 Dallas, 386.

(b) An example of an ex post facto law would be a law passed defining as criminal a certain act, and making criminally liable a person who had done that act prior to the passage of the law. An example of a retroactive law would be an act of a state legislature setting aside a decree of a court theretofore rendered and granting a new hearing. See *Calder vs. Bull*, 3 Dallas, 386.

(c) The right of eminent domain exists in the government of the U. S., and may be exercised within the states so far as necessary in the enjoyment of powers conferred upon it by the constitution. *Kohl vs. United States*, 91 U. S., 367.

(d) Yes.

The United States have a property in the mails. They are not mere common carriers, but a government, performing a high official duty in holding and guarding its own property, as well as that of its citizens committed to its care; for a very large portion of the letters and packages conveyed in the mails consist of communications to or from the officers of executive departments, or members of the legislature on public service, or in matters of public concern. *Searight vs. Stokes*, 3 How., 151, 169.

### Question 564.

Name twenty subjects that are covered by the Bill of Rights in the Ohio Constitution.

### Answer 564.

(1) Right of enjoying and defending life and liberty, acquiring and possessing, and protecting property, and seeking and obtaining happiness and safety.

(2) Right to alter, reform, or abolish the Government.

(3) Right to assemble together, in a peaceable manner, to consult for their common good.

## OHIO SUPREME COURT

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- (4) Right to instruct their representatives.
- (5) Right to petition the General Assembly for the redress of grievances.
- (6) Right to bear arms for their defense and security.
- (7) Right that trial by jury shall be inviolate.
- (8) Right that there shall be no slavery in this state, nor involuntary servitude, unless for the punishment of crime.
- (9) Right that all men worship Almighty God according to the dictates of their own conscience.
- (10) The privilege of the writ of habeas corpus shall not be suspended, unless in cases of rebellion or invasion, the public safety require it.
- (11) All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident, or the presumption great.
- (12) In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel.
- (13) To demand the nature and cause of the accusation against him, and to have a copy thereof.
- (14) To meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf.
- (15) A speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.
- (16) No person shall be compelled, in any criminal case, to be a witness against himself.
- (17) No person shall be twice put in jeopardy for the same offense.
- (18) Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right.
- (19) No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood or forfeiture of estate.
- (20) Right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated.
- (21) No person shall be imprisoned for debt in any civil action on mesne or final process, unless in cases of fraud.
- (22) Every person, for an injury done him in his land, goods, person, or reputation shall have remedy by due course of law.
- (23) Private property shall ever be held inviolate but subservient to the public welfare.

## BAR EXAMINATIONS

(24) The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law. Bill of Rights, Art. 1, Const., State of Ohio.

Question 565.

(a) When a part of an act of the General Assembly is found to be unconstitutional, how will it be determined whether the entire act is unconstitutional or not?

(b) What courts are expressly provided for in the Constitution of Ohio?

(c) What original jurisdiction has been conferred upon the Court of Appeals?

Answer 565.

(a) An unconstitutional section in a statute, or in the rules of an administrative body, such as a board of health, does not render the entire statute, or the entire body of rules, invalid, if the two parts are not so inseparably connected in subject matter and so related to each other as to create a presumption that a part would not have been enacted without the whole. *Metropolis vs. Elyria*, 23 O. C. C., No. 8, 544; *Giting Railroad vs. Commissioners*, 31 O. C., 338; *Gibbons vs. Catholic Institute*, 34 O. S., 289.

An entire statute or ordinance will not be rendered invalid by the fact that some parts are unconstitutional, if it can fairly be inferred that the legislative body, which enacted it, would have enacted the parts of it which are constitutional, even if the parts of it which are unconstitutional could not take effect. *Toledo vs. Brown*, 14 O. C. C., N. S., 165; 22 O. C. D., 357; Affirmed without opinion; *Brown vs. Toledo*, 83 O. S., 491.

Where the unconstitutional provisions of an act are so interwoven with the other provisions of the act as to be inseparable, the whole act is unconstitutional. *Harmon vs. State*, 66 O. S., 249.

(b) The judicial power of the state is vested in a Supreme Court, Courts of Appeals, Courts of Common Pleas, Courts of Probate, and such other courts inferior to the Courts of Appeals as may from time to time be established by law. Art. 4, Sec. 1, Const. State of Ohio.

(c) The courts of appeals shall have original jurisdiction in

(1) Quo Warranto.

(2) Mandamus.

(3) Habeas corpus.

(4) Prohibition.

## OHIO SUPREME COURT

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(5) **Proceedendo. Art. IV, Sec. 6, Constitution of State of Ohio.**

Question 566.

What constitutional invalidity, if any, would there be in enactments by the General Assembly as follows:

(a) Providing for a pension for Ex-Governors and their heirs forever?

(b) Providing that one charged with murder in the first degree may be tried upon an information filed by the prosecuting attorney?

Answer 566.

(a) The law is invalid on account of the following provision of the Ohio Constitution:

The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of the parties, and officers, by curing omissions, defects and errors in instruments and proceedings, arising out of their want of conformity with the laws of this state. Art. II, Sec. 28, Const. State of Ohio.

(b) The law would be invalid, because of the provision of Article I, Section 10 of Ohio Constitution, that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment, of a grand jury."

Question 567.

What constitutional invalidity, if any, in the following acts:

(a) Providing for a state tax rate of two mills on the dollar in counties having a population of fifty thousand and more, and of three mills on the dollar in counties having a population of less than fifty thousand?

(b) Providing for the admission of John Jones to practice in the courts of Ohio?

(c) Providing that not to exceed four expert witnesses on either side can be used upon any one subject in a criminal trial?

Answer 567.

(a) The law would be unconstitutional as against the provision of Article II, Sec. 26 of the Ohio Constitution which provides as follows:

## BAR EXAMINATIONS

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"All laws, of a general nature, shall have a uniform operation throughout the state."

(b) Invalid as it is an exercise of judicial power.

"The act of 82, 84, reinstating a disbarred attorney is unconstitutional, it being an usurpation of judicial power and special legislation." *State vs. Brough*, 15 O. C. C., N. S., 97; 23 O. C. D., 257. Affirming in re *Thatcher*, 12 O. N. P., N. S., 273; Affirmed 90 O. S., 382.

(c) The law would be valid, because of the following provision in Article 2, Section 39 of the Ohio Constitution:

"Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings."

**OHIO STATE BAR EXAMINATION,**

**JUNE, 1910**

**LEGAL ETHICS**

**Question 568.**

(a) Define the term "legal ethics."  
(b) What duties with regard to your client and with regard to your acceptance of compensation in connection with his business do you swear to obey when you take the oath of admission to the bar?

(c) How, if at all, is a contingent fee contract between an attorney and client affected by a stipulation therein that the client shall not compromise or settle the matter in controversy without the consent of the attorney? Give reason for your answer.

**Answer 568.**

(a) That branch of moral science which treats of the duties which a member of the legal profession owes to the public, to the court, to his professional brethren and to his client. Bouvier's Law Dictionary.

(b) I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval. Canons of Professional Ethics, Oath of Admission.

(c) The illegal stipulation in a champertous contract for a contingent fee providing that a client shall not compromise or settle his claim without the consent of his attorney, cannot be ignored and the other provisions of the contract enforced. Davy vs. Insurance Co., 78 O. S., 256.

**Question 569.**

In the course of representing a client in certain specific matters, you are informed by him that he is the real owner of an apartment house held by a friend of the client, the property having been transferred by your client to the name of his friend, for the purpose of avoiding a judgment, and that the deed of that conveyance is on record, but that your client has taken back a deed of the property from his friend to himself, that deed remaining off record and being in your client's possession. You receive this information in the course of a general discussion not in any way connected

## BAR EXAMINATIONS

with any matter in which your service or advice had been given.

Your client afterwards fails to pay you for your services and you have brought suit and recovered judgment against him for the value of the same. Execution on your judgment is issued and returned unsatisfied and it then appears to you that the collection of your judgment and, therefore, your compensation for your services will be impossible unless you proceed after your client's interest in the real estate above mentioned.

Would it be proper for you in enforcing your claim for compensation against your client by legal process to attempt to reach your client's interest in that real property?

**Answer 569.**

It would not be proper.

An attorney cannot make use of any knowledge acquired by him through his professional relations with his client, to promote his own advantage, but in every such case will be conclusively presumed to be acting for his client's benefit. Nor can the attorney, in such a case, make use of any knowledge thus acquired to impeach the proceedings by which his client acquired title. The obligation of fidelity which an attorney owes to his client is a continuing one; he cannot make use of any knowledge acquired from his client or through his professional relation for his own advantage, adverse to the interests of his client, or those claiming through him, even after the confidential relations have ceased. In order to call the rule into play, the relation of attorney and client must have subsisted between the parties with respect to the particular transaction in question. 6 Corpus Juris, 683.

**Question 570.**

You are employed as attorney to represent and defend a man accused of a serious crime. Your employment is by relatives of the accused, who are satisfied that the accused is innocent, and they furnish you with all the information concerning the crime that they have been able to obtain. This information shows that the evidence of the guilt of the accused is mostly of a circumstantial nature, but that there is one witness for the State who is likely to give damaging direct evidence against him. After your employment, as above stated, in your interview with the accused, he admits to you that he is guilty as charged, but proposes to take the stand in his own behalf and to deny his guilt.

## OHIO SUPREME COURT

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and offer evidence to establish an alibi, and he gives you the names of two of his friends, who have good reputations in the community, who signify to you their willingness to testify in behalf of defendant, and to corroborate the false testimony the accused intends to offer in his own behalf. What are your ethical duties and obligations in the case?

**Answer 570.**

To inform the client that you will not present this defense involving perjury and subornation of perjury, and that if such defense is to be presented, you will ask to be relieved of the conduct of the case.

"It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law." Canons of Legal Ethics, Art. II, Sec. 5.

The law the lawyer does not control, but as to facts there is grave responsibility. No special rule can be formulated to distinguish between true and false advocacy, and allowance is to be made for the avowedly partisan attitude of the counsel, but "from a piece of false evidence, or a false statement in argument, every decent lawyer starts back." Certainly nothing could be any worse than to give any sanction whatever to a theory which, though never avowed, may sometimes be tacitly assumed, that the practice of the law is a game, or a species of warfare, in which there may be a few rules agreed upon, but in the main there is but one thing to consider, and that is victory. As in the strange unethical ethics of war you may not use poisoned bullets, but may use explosive shells, and may not poison the well in the besieged city, but may destroy the provision train on its way thither, so in a court of law, on this monstrous theory, though you may not actually suborn witnesses you may take advantage of every piece of falsehood which in any other way can pass in, undetected, in evidence or argument. But if law is a game, it is a game in which the stakes are human happiness and character; if it is war, it is not a war for plunder, but one for principles, which cannot be set up with glory in the end if they have been first defiled and trampled under foot by the victors. Bouvier's Law Dictionary, Vol. 1, p. 1089.



**Question 571.**

You, as a practicing lawyer, have borrowed money upon note secured by mortgage. You want to obtain a renewal of the loan, but find that your lender's attorney for his own selfish purpose declines to assent to the renewal by his client unless he himself is bounteously compensated. Under these circumstances, can you properly deal direct with the client? Give reason for your answer.

**Answer 571.**

It would not be proper to deal direct with the client, even under these circumstances.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. Canons of Professional Ethics, Art. II, Sec. 9.

**Question 572.**

May you properly accept employment from a person to sue a brother of the latter for damages by reason of his negligently driving his automobile, when the brothers are on perfectly friendly terms, and would not engage in litigation, notwithstanding the negligence and damage, except for the fact that the negligent brother has a policy of accident insurance whereby he will not be the real loser in case of recovery? Give reason for your answer.

**Answer 572.**

It would be proper to bring the action.

The party injured by a tortious act is entitled to compensation, and the fact that he might waive his claim against a certain person who would have been liable, does not make it necessary to waive it against another person.

Not every action in tort is essentially adversary, the purpose of some actions in case there is a legal liability, being merely to ascertain the amount of compensation to which the injured party is entitled.

## OHIO STATE BAR EXAMINATION

DECEMBER, 1919

### LEGAL ETHICS

#### Question 573.

If a person seeks to employ a lawyer to bring suit in which there seems to him to be a probable chance of success, yet the suit appears to the lawyer to be unjust, what course should he take?

#### Answer 573.

He must decline to bring the suit, in accordance with his oath.

"I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust." Canons of Professional Ethics, Art. III.

#### Question 574.

Having been employed to defend a case the lawyer, after examining authorities, concluded that the defense could not be maintained except by argument of a proposition not in his mind honestly debatable under the law of the land, what course should he take?

#### Answer 574.

He should get the consent of his client and the court to be relieved from further conduct of the case. "I will not counsel or maintain any defense except such as I believe to be honestly debatable under the law of the land." Canons of Professional Ethics, Art. III.

#### Question 575.

On what occasions, if any, is a lawyer justified in seeking to mislead the judge or jury by an artifice or false statement of fact or law?

#### Answer 575.

Never.

"The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." Canons of Professional Ethics, Art. II, Sec. 22.

#### Question 576.

On the trial of a cause, the lawyer has an opportunity to expose a personal matter highly discreditable to a witness called by the opposite party.

What should be his course?

Answer 576.

He should not avail himself of the matter, unless it is absolutely necessary for the protection of his client's interests.

"A lawyer should always treat adverse witnesses and suitors with fairness and with due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a case. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf." Canons of Professional Ethics, Art. II, Sec. 18.

"An opponent should always be treated with civility, and, if it be necessary to say severe things of him or his witnesses, it should be done in the language and with the manner of a gentleman." Sharswood, p. 118.

Question 577.

-Suppose a defendant with no defense is willing to pay you a fee of a couple of hundred dollars to delay the plaintiff's cause, which was not unusually difficult, would your oath as a lawyer prevent your accepting the employment?

Answer 577.

It would.

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice." Canons of Professional Ethics, Art. III.

# **OHIO STATE BAR EXAMINATION**

**JUNE, 1920**

## **LEGAL ETHICS**

**Question 578.**

State the reasons upon which you based your decision to become a lawyer.

**Answer 578.**

The answer to this question is of course, personal to the student.

**Question 579.**

What do you conceive to be the principal duties of a lawyer?

**Question 579.**

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the Bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that any many other states of the Union—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

### **I DO SOLEMNLY SWEAR:**

I will support the Constitution of the United States and the Constitution of the State of Ohio.

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land.

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval; I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged. I will never

## BAR EXAMINATIONS

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reject, from any consideration personal to myself, the cause of the defenseless or oppressed; or delay any man's cause for lucre or malice, SO HELP ME GOD. Canons of Professional Ethics, Art. III.

Question 580.

What should be the relationship of a lawyer to the courts?

Answer 580.

It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected. Canons of Legal Ethics, Art. II, Sec. 1.

Question 581.

What obligations does a lawyer owe to the public generally?

Answer 581.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will

## OHIO SUPREME COURT

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find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen. Canons of Professional Ethics, Art. II, Sec. 32.

Question 582.

If, when a jury is being selected to try a civil case in which you are employed by one of the parties, one of the prospective jurors answers all questions asked him truthfully and is about to be accepted as a juror, yet you know that on account of his friendship for and faith in you he is bound to give his verdict in favor of your client if you assert (as you must) that your client should prevail is it your duty to see that this juror is excused? Answer fully.

Answer 582.

It would be the duty of the lawyer under these circumstances to see that the juror was excused.

"The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." Canons of Professional Ethics, Art. II, Sec. 22.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1920**

**LEGAL ETHICS**

**Question 583.**

**Define champerty.**

**Answer 583.**

**Champerty means stirring up strife and litigation.**

**It is unprofessional for a lawyer to volunteer advice to bring a law suit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable by common law. Canons of Professional Ethics, Art. II, Sec. 28.**

**Question 584.**

**(a) What communications between attorney and client are privileged?**

**(b) Under what circumstances may an attorney testify concerning a communication made to him by his client in that relation or his advice to his client?**

**Answer 584.**

**(a) General Code, 11494. An attorney shall not testify concerning a communication made to him by his client in that relation, or his advice to his client.**

**(b) General Code, 11494. The attorney may testify by express consent of the client; and if the client voluntarily testifies, the attorney may be compelled to testify on the same subject.**

**Question 585.**

**State the causes for which an attorney at law may be removed from office in the state of Ohio.**

**Answer 585.**

**General Code, 1707. The Supreme Court, Court of Appeals, or Court of Common Pleas may suspend or remove an attorney at law from office, for misconduct in office, conviction of crime involving moral turpitude, or unprofessional conduct involving moral turpitude. Such suspension or removal shall operate as a suspension or removal from all the courts of the state.**

## OHIO SUPREME COURT

Question 586.

To what extent, if at all, may a lawyer assert in argument his personal belief in his client's innocence or in the justice of his cause?

Answer 586.

It is improper for a lawyer to advance in argument his personal belief in a client's innocence or in the justice of his cause. Canons of Professional Ethics, Art. II, Sec. 45.

Question 587.

(a) What is the duty of a lawyer to the courts?

(b) What is the duty of a lawyer assigned as counsel for an indigent prisoner?

Answer 587.

(a) It is the duty of a lawyer to maintain toward the court a respectful attitude, not for the sake of the temporary incumbents of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the bar against unjust criticism and clamor. Canons of Professional Ethics, Art. II, Sec. 1.

(b) A lawyer assigned as counsel for an indigent prisoner ought not to be asked to be excused for any trivial reason, and should always exert his best efforts in his behalf. Canons of Professional Ethics, Art. II, Sec. 4.



# OHIO STATE BAR EXAMINATION

JUNE, 1921

## LEGAL ETHICS

Question 588.

What qualifications do you consider one should possess to entitle him to admission to the bar?

Answer 588.

The cardinal virtues of a lawyer are truth, simplicity and candor. Sharswood, p. 169.

Question 589.

Is it ethical for an attorney at law to advertise his talents or skill as a shopkeeper advertises his wares? Why?

Answer 589.

Solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. (All of the methods of shop keepers are equally so.)

Such methods defy the traditions and lower the tone of our high calling, and are intolerable.

The most worthy and effective advertisement possible is the establishment of a well merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. Canons of Professional Ethics, Art. II, Sec. 27.

Question 590.

If you were called upon as an attorney to write the will of a person, who you were satisfied in your own mind did not have mental capacity to make a will, what would you do, and why?

Answer 590.

Advise the client that I could not accept the employment. No lawyer is obliged to act, either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment.

The responsibility for advising questionable transactions is the lawyer's responsibility. Canons of Professional Ethics, Art. II, Sec. 31.

## OHIO SUPREME COURT

### Question 591.

A is indicted by the grand jury for the commission of a crime. You are retained by him to defend. Trial day comes on and he then admits to you for the first time that he is guilty as charged in the indictment but refuses to plead guilty. What is your duty as an officer of the Court?

### Answer 591.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law. Canons of Professional Ethics, Art. II, Sec. 5.

### Question 592.

The court in its charge to the jury mis-states the law, which mis-statement you know is not the law.

(a) What would you do if it was in favor of the interest of your client?

(b) What would you do if it was against the interest of your client?

### Answer 592.

(a) Inasmuch as the conduct of the lawyer before the court should be characterized by candor and fairness, I would advise the court, that, in my opinion, the court in his charge was mistaken as to the law of the matter.

(b) Object to the charge being so given, and if the objection was overruled, reserve an exception to the ruling.

### Question 593.

A brings suit against B on a note, which note was given by B to A. B admits to you that he was of full age and of sound mind at the time he gave the note, that it called for a legal rate of interest; that it was given for a good and valuable consideration; that the amount sued for has not been paid; that he has no complaint whatever to make against A as to why it had not been paid, but now seeks to avoid payment by pleading the Statute of Limitations, which pleading if filed would release him from payment. Would you file such a plea for him?

## BAR EXAMINATIONS

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### Answer 593.

In foro conscientiae, a defendant who knows that he honestly owes the debt sued for, and that the delay has been caused by indulgence or confidence on the part of the creditor, ought not to plead the statute, and an attorney ought not to advise him to do so. Sharswood, p. 83.

**OHIO STATE BAR EXAMINATION**

**DECEMBER, 1921**

**LEGAL ETHICS**

**Question 595.**

(a) State what recognized canons of legal ethics and text-books on the subject you have read.

(b) What different relations sustained by an attorney were chiefly discussed and considered therein.

**Answer 595.**

(a) Canons of Professional Ethics adopted by the American Bar Association, August 27, 1908.

Sharswood's Legal Ethics, 5th Edition published by the American Bar Association in 1907.

"The Responsibilities of the Lawyer," by Joseph B. Warner (American Bar Association, 1896) Henry Wade Rogers, in 16 Yale L. J., 225.

(b) Duty of the lawyer to the courts.

Duty in the selection of judges.

Duty when defending indigent prisoner.

Duty in defending and prosecuting those accused of crime.

Duty to associate counsel.

Duty in advising clients and in fixing fees.

Treatment of witnesses and litigants.

Appearing as witness for client.

Duty to opposing counsel.

Duty to uphold the honor of the profession. Canons of Professional Ethics.

**Question 596.**

Can an attorney conscientiously and properly appear in behalf of an accused person whom he believes to be guilty? Give reasons for answer.

**Answer 596.**

**Yes.**

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present

## BAR EXAMINATIONS

every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law. *Canons of Legal Ethics, Art. II, Sec. 5.*

Question 597.

Is it proper for an attorney to advise a judgment debtor client to claim his legal exemptions as against a judgment claim which the attorney knows to be just?

Answer 597.

As a general rule it is proper, as creditors have contracted with him with a knowledge of the exemptions to which he is entitled; but, when a person has ample means to pay, it is immoral to advise him to claim his exemptions for the purpose of delaying or harassing his creditors. *Sharswood Legal Ethics, pp. 113, 114.*

Question 598.

State generally what authority in and out of court an attorney of record in a case has, without direction from his client, with respect to the prosecution, defense, and management of the action.

Answer 598.

"An attorney at law has authority, by virtue of his employment as such, to do in behalf of his client, all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which effect the remedy only, and not the cause of action." *Huffcut on Agency, p. 154. Citing Moulton vs. Bowker, 118 Mass. 26; Clark vs. Randall, 9 Wis. 135.*

Question 599.

(a) D, an attorney, entered into a contract in writing with one E who had a claim for damages against a railroad company for personal injuries, by which contract it was agreed that D was to receive for his services in prosecuting said claim a contingent fee of thirty per cent of the amount to be recovered on said claim by judgment or settlement, and that E was not to compromise or settle said claim without the consent of D. Thereafter, while an action instituted by E (D appearing as his attorney of record) on said claim was pending, but before judgment therein, said railroad company, with full knowledge of the terms of said contract, compromised and settled said claim without D's knowledge or consent. D, on learning of said settlement and finding that E had parted with the money received by him

## OHIO SUPREME COURT

on said settlement and was insolvent, brought an action against the railroad company to recover thirty per cent of the money paid by the railroad company to E on said settlement. Should D recover in said action? Give reasons for answer.

(b) State generally what things appearing in a contract between an attorney and his client, providing for a contingent fee for the prosecution of a claim had by such client against a third person, will render said contract champertous.

**Answer 599.**

(a) "While a contract having attorney's fee contingent upon the amount to be recovered by judgment or settlement is ordinarily valid, yet when such contract contains a stipulation that the client shall not compromise or settle his claim without the consent of the attorney, it is champertous and voidable at the option of the client, and its illegality will avail as a defense in any action against a third party which is based on the contract.

In such case the illegal stipulation cannot be ignored, and the other provisions of the contract enforced." *Davey et al, Partners vs. The Fidelity and Casualty Ins. Co.*, 78 O. S., 256.

(b) The really vital question in all of these cases is this: Does the contract contain an express or implied limitation upon the right of the client to compromise and settle his claim with his adversary without the consent of anybody else? When such a limitation appears in the contract, the contract is voidable at the option of the client, and its illegality may be pleaded as a defense in any action founded on the contract." *Id.* at p. 267.

**Question 600.**

D, an attorney in a city in Ohio, acting on behalf of a local client, forwarded for collection a commercial claim had by such client against a party in Chicago to R, an attorney of the last named city. R collected said claim and charged for his services the sum of \$250 and remitted one-third of this amount to D, as per agreement between the attorneys in this and other like cases. Thersafter D, without the knowledge of R, presented a bill to his said client for \$300 and received the money, without advising his client of the receipt by him of his portion of the fee charged by R.

Was D guilty of any improper conduct in his relations to R or to his own client?

**Answer 600.**

**D was guilty of improper conduct in his relations to R.**

**"The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness." Canons of Professional Ethics, Art. II, Sec. 22.**

**D was guilty of improper conduct in his relations to his client.**

**"Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him." Canons of Professional Ethics, Art. II, Sec. 11.**

**I will accept no compensation in connection with (my client's) business, except from him or with his knowledge and approval. Oath of Admission.**

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950. At the same time, the population of rural areas has decreased from about 100 million in 1900 to about 50 million in 1950. This has led to a concentration of the population in urban areas, which has had a number of important consequences.



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